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Property Review of Selected 1970 California Legislation

University of the Pacific; McGeorge School of Law

Property

Landlord-Tenant; untenantability of dwelling

Civil Code §§1941.1, 1941.2, 1942.5 (new); 1942 (amended).
AB 2033; STATS 1970, Ch 1280

Chapter 1280 relates to the lessor's duty to repair buildings intended for human occupation. Standards are established to determine when premises are untenantable. Further, the rights of the parties are established and provide for remedies when either the landlord or tenant fails to abide with one of the provisions of Sections 1941 and 1942.

Section 1941 requires the lessor of a building intended for human occupancy, in the absence of an agreement to the contrary, to keep the building in a tenantable condition.

Section 1941.1 adds a definition of untenantable for purposes of the Section if it substantially lacks any one of several standard characteristics which are; effective water-proofing and weather protection of roof and exterior walls, including unbroken windows and doors; heating facilities which conformed with applicable law at the time of installment, maintained in good working order and; an adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control.

Section 1941.2 is added to the Civil Code to provide that no duty on the part of the lessor shall arise under Section 1941 or 1942 if the lessee is in substantial violation of any of the enumerated affirmative obligations. Examples of these affirmative obligations are: to dispose of all rubbish, garbage and other waste, in a clean and sanitary manner; to properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits; and to keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

Section 1942 provides that if within a reasonable time after notice to the lessor of dilapidation which he should repair, he neglects to do

so, the lessee may repair the same himself, where the cost of repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

As amended, this remedy shall be available to the lessee only once in any 12 month period. Also, if a lessee acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption is a presumption affecting the burden of producing evidence. (*See Evidence Code Section 603*).

Section 1942.1 is added to provide that any agreement by a lessee of a dwelling waiving or modifying his rights under Sections 1941 and 1942 is void as contrary to public policy, except that the parties may agree that the lessee shall improve, repair or maintain all or stipulated portions of the dwelling as part of the consideration for rental.

Also, if an agreement is in writing, the parties must set forth the provisions of Sections 1941 through 1942.1, and provide that any controversy over untenantability may by application of either party be submitted to arbitration (*see Code of Civil Procedure Section 1280 et seq.*) and that the costs of arbitration shall be apportioned by the arbitrator between the parties.

Section 1942.5 is added to provide that a lessor cannot evict his tenant for exercising his rights under these Sections if the lessor's dominant purpose is retaliation against his tenant. The lessor cannot evict, increase the rent or decrease services within 60 days of the tenant's notice of the untenantable condition or after the tenant's notice to an appropriate governmental agency of the condition or after the date of inspection or issuance of a citation resulting from a complaint to a governmental agency or after an arbitration award when the issue is decided adversely to the lessor. The 60 day period begins to run from the latest date of any of the above events.

A lessee may not invoke this remedy more than once in any 12 month period. Nothing in Section 1942.5 is to be construed as limiting in any way the exercise by the lessor of his lawful rights.

Any waiver by the lessee of his rights under this Section is void as contrary to public policy.

This act shall not apply to any lease, option or other agreement entered into prior to January 1, 1971, except that it shall apply to a lease or hiring of a dwelling which is renewed by agreement, or presumed to have been renewed pursuant to Section 1945 of the Civil Code (*Re-*

newal by continued possession and acceptance of rent) after January 1, 1971.

References:
1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§245, 246 (1960), §246A (Supp. 1969).
2) Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CAL. L. REV. 304 (1965); Comment, *Contracts of Adhesion under California Law*, 1 U.S.F. L. REV. 306 (1967); Note, *Retaliatory Eviction—Is California Lagging Behind?*, 18 HAST. L.J. 700 (1967).
3) Annot., 12 A.L.R.3d 958 (1967); Annot., 22 A.L.R.3d 521 (1968); Annot., 27 A.L.R.3d 924 (1969).

Leases, Remedies for Breach

Civil Code §§1951-1952.6 (new); 3308 (amended); Code of Civil Procedure §§337.2, 339.5 (new).

AB 171; STATS 1970, Ch 89

(*Effective July 1, 1971*)

Chapter 89 adds several sections to the Civil Code to clarify the rights and procedures of a lessor to recover damages from a lessee who breaches a lease and abandons the property. Two Sections are added to the Code of Civil Procedure setting forth the time within which actions under the new additions to the Civil Code may be brought, depending upon whether the lease is written or unwritten.

Section 1951 is added to the Civil Code to include in the definition of "rent" charges equivalent to rent, and the use of the word "lease" to include a sublease, as those words are used in Sections 1951.2 to 1952.6, inclusive.

Section 1951.2 provides for the types and measure of damages a lessor may recover from a lessee who breaches a lease of real property and abandons the property (*except as otherwise provided in Section 1951.4*). The effect of Section 1951.2 is to allow a lessor a present cause of action on a lease when the lessee breaches and abandons the property, and provides for the types of damages such a lessee can be held liable for and what procedures are required to compute such damages. Under Section 1951.2, the lease terminates when either the lessee breaches the lease and abandons the property before the end of the term, or if his right to possession is terminated by the lessor because of a breach of the lease. Upon termination of the lease the lessee is liable to the lessor for: (1) the worth at the time of award of the unpaid rent which had been earned at the time of termination; (2) the worth at the time of award of the amount by which the unpaid rent

which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided; (3) subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and (4) any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom. Subdivision (b) computes "worth at the time of award"—referred to in paragraphs (1) and (2) of subdivision (a)—by allowing interest at such lawful rate as may be specified in the lease or, if no such rate is specified in the lease, at the legal rate. However, "worth at the time of award" referred to in paragraph (3) of subdivision (a), is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent. Subdivision (c) limits the recovery of a lessor under paragraph (3) of subdivision (a) only if:

> (1) The lease provides that the damages he may recover include the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period that the lessee proves could be reasonably avoided; or
>
> (2) The lessor relet the property prior to the time of award and proves that in reletting the property he acted reasonably and in a good-faith effort to mitigate the damages, but the recovery of damages under this paragraph is subject to any limitations specified in the lease.

Subdivision (d) provides that the lessor's right to recover damages under this Section are not waived by efforts of the lessor to mitigate the damages caused by the lessee's breach and abandonment of the property. Prior to enactment of this paragraph, a lessee's breach and abandonment of the property did not, in the absence of a provision to the contrary in the lease, give rise to an immediate cause of action for damages in contract. Such conduct merely amounted to an offer to "surrender" the remainder of the term. The lessor had three alternative courses of action: (1) He could refuse to accept the offered surrender and sue for the rent as it became due under terms of the lease; (2) He could accept the surrender and regard the lease as terminated, thereby terminating the right to any future rents; (3) He could notify the lessee the property would be relet for lessee's benefit, take possession and relet,

then sue for damages caused by lessee's default, and the cause of action accrued at the end of the original term of the lease. If, therefore, the lessor chooses to mitigate his damages, in the absence of a provision in the lease, he could lose his right to future rent if the court found he had accepted lessee's offer to surrender. Subdivision (e) provides that the right of a lessor under a lease of real property to indemnification for liability arising prior to termination of the lease for personal injuries or property damage, if provided for in the lease, is not affected by this Section.

Section 1951.4, is added to the Civil Code to provide that when it is provided in the lease for the remedies of this Section and a lessee breaches and abandons the property, the lessor may elect to continue the lease and enforce all his rights and remedies under the lease so long as the lessee's *right to possession* is not terminated. Acts by the lessor to maintain, preserve, or efforts to relet the property do not constitute a termination of the lessee's right to possession under this Section. Appointment of a receiver by lessor to protect his interest under the lease is also not a termination of lessee's right to possession under this Section. The Section, however, is silent as to what acts of the lessor would constitute a termination of a lessee's right to possession. The Section would appear, therefore, to leave an open question as to the status of the lessee with respect to his right to possession to the property in relation to the rights of the lessor to make an effort to relet the property.

Section 1951.5 adds to the Civil Code a provision stating that Sections 1670 and 1671, relating to liquidated damages, apply to a lease of real property. Section 1951.7 defines "advance payment" as used in this Section to mean money paid to a lessor of real property as prepayment of rent, or as a deposit to secure faithful performance of the terms of the lease, or any other payment which is the substantial equivalent of either of the above. Payment not in excess of the amount of one month's rent is not an advance payment for purposes of this Section. Section 1951.7 also provides for a notice from the lessor to the lessee upon a reletting of property giving the name and address of the new lessee; such notice to be delivered to the lessee by mail or personally, not later than 30 days after the new lessee takes possession of the property. Such notice must be given only if: (1) the lessee has made an "advance payment"; (2) the lease is terminated pursuant to Section 1951.2; and (3) the lessee has made a request, in writing, to the lessor that he be given such notice.

Section 1951.8 provides that the lessor's rights under a lease of real property to equitable relief, where such relief is appropriate, is not

affected by this Section. Section 1952 provides that nothing in Section 1951 to 1951.8, inclusive, affects the provisions of Chapter 4 (*commencing with Section 1159*) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer. The bringing of an action under the above Chapter of the Code of Civil Procedure, while not affecting the lessor's right to bring a separate action for relief under Section 1951.2, 1951.5, and 1951.8, will not allow recovery of damages in the subsequent action for any detriment for which a claim for damages was made and determined on the merits in the previous action. However, if the lessor obtains possession of the property under a judgment pursuant to Section 1174 of the Code of Civil Procedure, he is no longer entitled to the remedy provided under Section 1951.4 unless the lessee obtains relief under Section 1179 of the Code of Civil Procedure.

Section 1952.2 states that Sections 1951 to 1952, inclusive, do not apply to any lease executed before July 1, 1971, or any lease executed after July 1, 1971, if the term of the lease were fixed by a lease, option, or other agreement executed before July 1, 1971. Sections 1951 to 1952.2, inclusive, do not include an agreement for the exploration for or the removal of natural resources as a lease of real property.

Section 1952.6 defines "public entity", as used in this Section, to include the state, a county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation. Section 1952.6 also provides that if any provision of Section 1951 to 1951.2, inclusive, is applied to invalidate a lease or an agreement for a lease of real property from or to any public entity or any non profit corporation whose title or interest in the property is subject to reversion to or vesting in a public entity, then such provision will not apply.

Section 3308 is amended by substituting the word "property" for the word "premises", and adds a paragraph stating that the Section does not apply to a lease of real property unless: (a) the lease was executed before July 1, 1971; or (b) the duration of the lease was fixed by a lease, option, or other agreement executed before July 1, 1971.

Section 337.2 is added to the Code of Civil Procedure to provide that where a lease of real property is in writing, no action shall be brought under Section 1951.2 of the Civil Code more than four years after the breach of the lease and abandonment of the property, or more than four years after termination of the right of the lessee to possession of the property, whichever is the earlier time. Section 339.5 is added to the Code of Civil Procedure providing for a lease of real property not in

writing, and states that no action shall be brought under Section 1951.2 of the Civil Code more than two years after the breach of the lease and abandonment of the property, or more than two years after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

Reference:

1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §286(c) (7th ed. 1960).

Hiring of Real Property; deposits

Civil Code §1951 (new).
AB 1189; STATS 1970, Ch 1317
(*Effective January 1, 1971*)

Section 1951 is designed to protect the interests of a landlord and tenant in money deposited or paid by the tenant to the landlord to secure performance of a rental agreement. The Section does not apply to deposits or payments made to secure execution of a rental agreement (*e.g., advance payment of rent*).

Money deposited or paid is to be held by the landlord for the tenant and, except for a trustee in bankruptcy, the claim of the tenant to such money will be prior to creditors of the landlord. The landlord's claim to the money held is limited to an amount reasonably necessary to remedy tenant defaults in payment of rent, to repair damages to the premises caused by the tenant, or to clean the premises upon termination of the tenancy; provided the deposit or payment is expressly made for one or each of these specific purposes. Any remaining portion of such deposit or payment shall be returned to the tenant no later than two weeks after termination of the tenancy.

Upon termination by the landlord of his interest in the dwelling unit in question (*e.g., sale, assignment, death, appointment of receiver or otherwise*) he may relieve himself of liability with respect to money held for the tenant by either of two alternatives. He may transfer the remaining portion after lawful deductions (*subdivision c*) to the landlord's successor and thereafter notify the tenant by registered mail of such transfer, including the name and address of the transferee in such notice; or, he may retain such lawful deductions as he may be entitled and return the remaining portion to the tenant.

The transferee, upon receipt of any portion of the deposit or payment from the landlord, shall have all of the rights and obligations with respect

to such deposit or payment as the transferor-landlord had when holding such deposit or payment.

The bad faith retention of the deposit by a landlord or his transferee in violation of this Section may subject such landlord or his transferee to damages not to exceed $200, in addition to actual damages.

This Section becomes effective on January 1, 1971 and applies only to deposits or payments made on or after such date.

Reference:

1) WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §174 (7th ed. 1960), (Supp. 1969).

Transfers of Property; revocation of power of attorney

Civil Code §1216 (amended).

AB 1592; STATS 1970, Ch 323

This amendment clarifies the procedure for revocation of a recorded power of attorney.

Section 1215 before this amendment provided that "no *instrument containing a power* to convey or execute instruments affecting real property, which has been recorded, is revoked . . . unless the instrument containing such revocation is also . . . recorded." This was interpreted to mean that a power of attorney over personal property contained in a recorded instrument along with a power affecting real property could only be revoked by recordation.

The California Bankers Association sponsored this legislation, which is designed to facilitate revocation of powers of attorney over personal property. The language of the amended Section now reads "no *power contained in an instrument* to convey or execute instruments affecting real property . . ." This language change clarifies that only powers affecting real property need be revoked by recordation. Thus a collateral power over personal property (such as a bank account) may be revoked without recordation even though it is contained in an instrument which affects real property.

References:

1) CAL. CIV. CODE §2356.
2) 1B MCKINNEY'S CAL. DIG. *Agency* §94 (1959); 20 MCKINNEY'S CAL. DIG. *Records* §25 (1955).

Secured Land Transactions; notice to parties

Civil Code §2943 (amended).
AB 130; STATS 1970, Ch 27

This amendment increases the category of persons entitled to a written statement itemizing pertinent information about a mortgage or deed of trust.

Section 2943 gives a trustor or mortgagor or junior lien holder basis for obtaining a statement of the unpaid balance and other information relating to the transaction. The Section specifies that a written statement enumerating the unpaid balance, interest rate, and other amounts which have become a lien on the property, and the amount and premium payments of insurance on the property must be given upon request to an "entitled person."

An entitled person currently includes the trustor of the deed of trust. With this amendment, Section 2943 is expanded to include an escrow holder licensed as an agent (*a person holding a valid, unrevoked license, who is engaged in the business of receiving escrows for deposit or delivery for compensation, Sections 17004 and 17005*) and any parties exempt from the provisions of Division 6 of the Financial Code (*Section 17006*).

Financial Code Section 17006 lists the following categories of persons:

> (1) Any person doing business under any law of this state or the United States relating to banks, trust companies, building and loan or savings and loan associations, or insurance companies;
>
> (2) Any person licensed to practice law in California who is not actively engaged in conducting an escrow agency;
>
> (3) Any person whose principal business is that of preparing abstracts or making searches of title that are used as a basis for the issuance of a policy of title insurance by a company doing business under any law of this state relating to insurance companies, and any person licensed by the Real Estate Commissioner while performing acts in the course of or incidental to his real estate business.

References:

1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* §73 (Supp. 1969).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 42.

Restraints Upon Alienation; vesting of interests

Civil Code §715.8 (repealed).

AB 123; STATS 1970, Ch 45

Chapter 45 repeals Civil Code Section 715.8 which provided an alternative test for the "vesting" of future interests under the common law rule against perpetuities. Now only the common law concept of "vesting" as codified in Section 715.2 (*lives in being and 21 years*), or the rule of Section 715.6 (*an interest is valid if it must vest within 60 years*) apply as definitions of "vesting" within the California rule against perpetuities.

The long and confusing history of the rule in California led to several attempts to clarify it between 1959 and 1963. [*Haggerty v. City of Oakland*, 161 Cal. App. 2d 407 (1958); *Lucas v. Hamm*, 56 Cal. 2d 583 (1961); *Wong v. DiGrazia*, 60 Cal. 2d 525 (1965)]. The old "suspension of the power of alienation" rules were repealed in 1959. (STATS. 1959, c. 470, p. 2405) leaving only the common law rule, which had been codified in 1951. But in 1958 the court in *Haggerty v. City of Oakland* ruled that a lease which was to begin after the completion of a certain building was invalid. This strict application of the common law rule against perpetuities shocked the bar (*Cal. L. Rev. Comm. Recommendation 912, Oct. 1969*). The rule was originally designed to prevent the tying up of landed estates for long or indefinite periods of time. It was felt that the rule should not be applied to virtually all commercial and contract transactions since there are ordinarily in such cases parties in being who can modify or terminate the contractual relationships. Accordingly, Section 715.8 was enacted in 1963 in an effort to overcome the possibility of mechanistic and purposeless application of the rule to commercial transactions. (STATS. 1963, c. 1455, p. 3010).

Section 715.8 proved inappropriate, however, for at least three reasons.

1) It was unnecessary, in the light of other developments, to achieve its purposes. Civil Code Section 715.5 confers the power of *cy pres* upon the courts. This rule of construction allows the courts to carry out the intentions of the parties to the extent possible when the courts are otherwise unable to give a document literal effect. This power allows courts to avoid most of the harsh effects obtained at common law. Section 715.6 provides an alternative method of vesting (*an interest which will vest within 60 years is valid*) to ameliorate the effects of the

common law test. In addition, the California Supreme Court in *Wong v. Di Grazia* overruled *Haggerty* by providing a judicial version of the rule of *cy pres*—the rule will be applied reasonably, in the light of its objectives and the economic condition of modern society.

2) The scope of the repealed Section exceeded the purpose for its enactment. In addition to exempting commercial transactions from the rule, it also exempted other arrangements, including private trusts. This undercut the policy of preventing the power of disposition from being used to curtail the existence of that power in future generations.

3) The existence of the Section led to much confusion and litigation, since no guidelines for its application were included in the statute.

For these reasons Section 715.8 has been repealed. However, its repeal will not affect the validity of any interest in real or personal property which is valid before the effective date of the act.

Reference:

1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §143(d) (Supp. 1969).

Eminent Domain; ecological reserves

Code of Civil Procedure §§1241.9 (new); 1241.7 (amended).

SB 922; STATS 1970, Ch 854

The amendment to Section 1241.7 adds ecological reserves established under Fish and Game Code article 4 (*commencing with Section 1580*), chapter 5, division 2, to a list of public uses for which property may be appropriated and notwithstanding any other provision of law to the contrary such appropriation for that use establishes a rebuttable presumption that the property was appropriated for the best and most necessary public use.

Section 1241.9 is added providing that property owned by a nonprofit organization, contributions to which are deductible for state and federal income tax purposes and having the primary purpose of preserving areas in their natural condition, is rebuttably presumed to be appropriated for the best and most necessary use if such property has been irrevocably dedicated to certain ecological or historical interests, and is open to the public and reasonably restricted. This presumption is one affecting the burden of proof (*See Evidence Code Sections 605, 606*).

If, pursuant to sub-section (b) of this Section, the property appropriated for the purpose of preserving its natural condition is subsequently sought to be acquired for state highway purposes, an action for

declaratory relief may be brought within 120 days after receipt of notice only by such non-profit organization owning the property. For the purposes of this action the resolution by the California Highway Commission shall not be conclusive evidence as to public necessity and public good (*See Streets and Highways Code Section 103*).

References:

1) 2 OPS. ATTY. GEN. 415 (1943).
2) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §224 (Supp. 1969).
3) Matteoni, *The California Roadway—"A More Necessary Public Use"*, 20 HAST. L.J. 551, 556 (1969).

State Highways; reimbursement of property owners

Streets and Highways Code §158.2 (new).

AB 1630; STATS 1970, Ch 1368

Chapter 1368 authorizes the Department of Public Works to make a payment, not to exceed $3,000.00, to the owner of a one to three family dwelling which is acquired for a project on the state highway system. The payment is to reimburse the owner for refinancing cost in acquiring similar property. To qualify for reimbursement the property acquired by the department must have been subject to a bona fide and recorded first mortgage or deed of trust for a mnimum of 2 years before the first offer by the department. Computation of such payment to the property owner is based upon a schedule adopted by the department taking into account: (1) Principal amount of new indebtedness not to exceed the unpaid debt at the time of acquisition; (2) a term not to exceed seven years or the remaining term of the original first mortgage or first deed of trust at the time of acquisition, whichever is shorter; (3) an interest rate as determined by the department not to exceed the prevailing interest rate on new Federal Housing Administration insured single-family home loans or Veterans Administration guaranteed home loans; (4) the present worth of the future payments of increased interest computed at an interest rate determined by the department.

Eminent Domain; arbitration of compensation

Code of Civil Procedure §§1273.01, 1273.02, 1273.03, 1273.04, 1273.05, 1273.06 (new); Government Code §15854 (amended).

AB 125; STATS 1970, Ch 417

With the addition of these new Sections to the Code of Civil Proce-

dure, the legislature has enacted provisions for arbitration as an alternative when the condemner and condemnee are unable to agree on the value to be paid for the property.

Prior to 1970, the value of property subject to condemnation was determined either by private negotiation, or by court action. Chapter 417 (*Section 1273.02*) provides that with the consent of both the condemner and the condemnee, arbitration can be used to settle "any controversy as to compensation."

There is no specific kind of arbitration required under these provisions. The parties may agree to formal arbitration by a board or informal arbitration by selecting one neutral appraiser to decide the dispute. Arbitration may be agreed to even after the property is taken or damaged. Eminent domain proceedings are not required for arbitration to proceed, and arbitration may be agreed to even though eminent domain proceedings are in progress.

Section 1273.03 provides that the condemner is liable for the cost of the neutral arbitrator, plus other expenses approved by the neutral arbitrator, not including attorney or expert witness fees. However, the condemner can agree to pay such attorney and witness fees.

Section 1273.04(d) provides that the enforceability of an arbitration agreement under this Chapter cannot be defeated by a showing that the acquiring party did not have the power or capacity to take the property by eminent domain.

Section 1273.05(a) provides that the parties may specify in an arbitration agreement such terms and conditions under which the acquiring party may abandon the acquisition or arbitration proceeding or they may prohibit any abandonment. If the agreement is silent concerning the prohibition of any abandonment the condemner may abandon at any time not later than the time for filing and serving a petition or response to vacate a arbitration award under Sections 1288 and 1288.2 of the Code of Civil Procedure.

Section 1273.05(b) provides that if the condemner subsequently abandons his effort to acquire the real property, or abandons the arbitration proceeding, the condemnee will be entitled to reasonable expenses, including attorney and appraiser fees.

Recording of the agreement, which will act as constructive notice for two years, is also provided under Section 1273.06.

This Chapter also includes an amendment to Government Code Section 15854 to conform that Section with the new arbitration provisions.

Previously, under Section 15854, all money paid for property acquisitions by a state agency could be expended only in accordance with a judgment in condemnation, a jury verdict, or a trial court determination that fixed the amount of compensation to be paid. An exception to these limitations was in cases where the acquisitions were from the federal government, other state agencies, involved less than $5000, or the parties had agreed to the price and the State Public Works Board unanimously concurred that the price was fair and reasonable. The amendment adds as an exception any acquisition pursuant to an arbitration agreement between the landowner and the State Public Works Board.

References:

1) CAL. CODE CIV. PROC. §§1237, 1280 *et seq.*
2) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §209 (7th ed. 1960); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §23 (7th ed. 1960); 3 WITKIN, CALIFORNIA PROCEDURE, *Judgment* §52 (1954).

Subdivisions; public access

Business and Professions Code §11610.5 (new).

AB 493; STATS 1970, Ch 1308

This amendment to Section 11610.5 is intended to fulfill the mandate of section 2 of article XV of the California Constitution which provides in part:

> . . . the Legislature shall enact such laws as will give the most liberal construction to the provision, so that access to the navigable waters of this state shall be always attainable for the people thereof.

Chapter 1308 provides that cities and counties, in approving subdivision maps of coastal land, require subdividers of coastal land to provide reasonable access to the publicly owned tidelands. The determination of reasonable access is to be made by the local government under guidelines which include consideration of: 1) access by highway, foot trail, bike trail, etc.; 2) the size of the subdivision; 3) the type of coastline uses such as skindiving, sunbathing, surfing, fishing, scientific exploration; 4) the likelihood of trespass on private property and reasonable means of avoiding same.

It provides protection for the property owners by exempting all subdivisions approved before the effective date of the Section, stating specifically that access need not be through the subdivision if otherwise avail-

able, and in addition specifically providing that a subdivider shall not be required to improve access intended primarily for the benefit of non-residents.

Reference:

1) Maxwell, *The Development & Ownership to California Tidelands* 41 L.A.B. BULL. 552 (1966).

Subdivisions; public lakes or reservoirs

Business and Professions Code §11610.7 (new).

AB 2418; STATS 1970, Ch 761

Section 11610.7 is added to provide that no county or city shall approve any map for a subdivision where the subdivision borders on a public lake or reservoir when no public access to the lake has been provided for in the map. Such public access routes must be expressly designated in the subdivision map and must expressly designate the governmental entity to which the routes are dedicated.

The city or county in approving the map must determine that the routes provide reasonable access from public highways to the lake or waterway. Factors for determining reasonableness of public access are set forth in sub-paragraph (c) (1)-(4) of this Section.

Any subdivision map can, however, be approved even if it does not provide for public access, if the city or county finds that reasonable access is otherwise available within a reasonable distance from the subdivision. There are no standards mentioned as to what is to be a reasonable distance.

Planning; zoning regulations

Government Code §65908 (new).

SB 164; STATS 1970, Ch 96

Section 65908 is added to permit any agency which institutes a judicial action to enforce any zoning regulation to file notice of the pending action with the county recorder in the county where the property is located. Upon recordation, the notice shall have the effect of a lis pendens.

Any party to the above action may make a motion to vacate the notice. An order to vacate is not appealable, but the aggrieved party has 60 days after entry of the order by the lower court to petition a higher

court for a review by a writ of mandate. The order to vacate cannot be recorded with the county recorder until the 60 days have elapsed.

References:

1) CAL. GOV'T CODE §§65900 *et seq.*
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 145.

Zoning; variances

Government Code §65906 (amended).

SB 23; STATS 1970, Ch 660

Section 65906 is amended to restrict the issuance of zoning variances.

Under existing law, two types of exemptions may be granted to zoning ordinances: 1) a "conditional use permit" which is granted for special land uses that are provided for in the zoning ordinance. 2) a "variance" (an exception to the provisions of a zoning ordinance) which is granted when, because of special circumstances, a strict application of the zoning ordinance would deprive a property owner of benefits enjoyed by other property owners in the same vicinity and which are subject to the same zoning classifications. Variances may not be granted if they constitute a grant of special benefit to a particular parcel of property.

Thus, under existing law and practice, variances traditionally have been authorized to permit exceptions to side, rear yard or setback requirements when, because of location, a hardship would result if the owner were not permitted this slight deviation from setback, height or other similar type of restrictions. This variance must not constitute a grant of special privileges inconsistent with other similarly zoned property. A variance may not be used, for example, to permit construction of a service station in a residentially-zoned area, as has been permitted by some local authorities.

Chapter 660 amending Section 65906 terminates the practice of administratively amending the zoning ordinance by granting a variance rather than by changing the zoning ordinance by amendment in the usual, formal manner, with notice, followed by a hearing before the local legislative body; or, granting a variance when the grant of a conditional use permit would have been the appropriate procedure. [See Dukeminier and Stapleton, *The Zoning Board of Adjustment; A Case Study in Misrule*, 50 KEN. L. J. 273 (1962)].

The amendment attempts to clarify and conform statutory law and

case law to the point that a variance is to be used to achieve parity but not to grant privilege. [See *Rubin v. Board of Directors*, 16 CAL. 2d 119 (1940); *Matthews v. Board of Supervisors*, 203 CAL. APP. 2d 800 (1962)].

References:

1) Hagman, CALIFORNIA ZONING PRACTICE §7.17, CONTINUING EDUCATION OF THE BAR (1969).
2) Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California*, 5 U.C.L.A. L. REV. 179 (1958); Martain, *New Alternatives to the Zone Variance*, 1968 Annual Conference, League of California Cities, Oct. 14, 1968; Comment, *The General Welfare, Welfare Economics, and Zoning Variances*, 38 S. CAL. L. REV. (1965).