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Property

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Property

Property; alternative home mortgage loan financing

Civil Code §§1916.7, 1916.10, 1916.11, 1916.12, 1917, 1917.010, 1917.020, 1917.030, 1917.031, 1917.032, 1917.033, 1917.034, 1917.040, 1917.041, 1917.042, 1917.043, 1917.044, 1917.050, 1917.060, 1917.061, 1917.062, 1917.063, 1917.064, 1917.065, 1917.066, 1917.067, 1917.068, 1917.069, 1917.070, 1917.071, 1917.072, 1917.073, 1917.074, 1917.075, 1917.110, 1917.120, 1917.130, 1917.131, 1917.132, 1917.133, 1917.134, 1917.135, 1917.140, 1917.141, 1917.142, 1917.150, 1917.151, 1917.160, 1917.161, 1917.162, 1917.163, 1917.164, 1917.165, 1917.166, 1917.167, 1917.168, 1917.170, 1917.171, 1917.172, 1917.173, 1917.174, 1917.175, 1918, 1919, 1920 (new); Financial Code §§1227.1, 7150.1 (new); §1227, 5074 (amended); Government Code §§11346.1, 11346.2 (amended); Insurance Code §12640.025 (amended).

AB 650 (Bane); STATS. 1982, Ch 274

Support: California Bankers Association; California Chamber of Commerce; California Mortgage Banking Association; California Savings and Loan League; State Banking Department

AB 2167 (Costa); STATS. 1981, Ch 1143

Support: Banking Department; Department of Consumer Affairs; Department of Corporations; Department of Housing and Community Development; Department of Real Estate

AB 2168 (Costa); STATS. 1981, Ch 1144

Support: CBIA Banking Department; Department of Consumer Affairs; Department of Housing and Community Development

SB 809 (Foran); STATS. 1981, Ch 1079

Support: Department of Finance

Creates adjustable-payment, adjustable-interest rate, and shared appreciate home loans; statutorily rejects the prohibition against due on sale clauses; imposes restrictions on variable rate home loans; extends 100 percent of market value loan insurance to renegotiable rate, variable interest rate, and adjustable-payment/adjustable interest rate loans; institutes non-fixed rate federally related loans; creates new categories of amortized loans; confers regulatory authority to establish state-federal loan parity.

Introduction

Current economic conditions which include high interest rates have made traditional fixed-interest rate home mortgages unaffordable to most home buyers in the state.¹ In an attempt to remedy this situation, the legislature has established two types of shared appreciation mortgages which attempt to make home financing more affordable by reducing the amount of monthly installment payments.² In addition, the use of pension funds as a new source of loan money has been authorized in an effort to increase housing construction and hedge inflation.³ Risk to lenders using the shared appreciation mortgage may be reduced by excepting these loans from the existing prohibition against due-on-sale clauses.⁴ Furthermore, new provisions regarding variable rate mortgage loans have been enacted to enable the market to respond more rapidly to fluctuating economic conditions, to preserve loan portfolio stability in the face of the phasing out of interest rate ceilings and differentials on deposits, and to facilitate the flow of mortgage capital in the state and enable creative home mortgage instruments to be utilized to meet the needs of borrowers with differing borrowing capability.⁵ Finally, this legislative intent is sought to be further effected by provisions creating state-federal regulatory parity⁶ and adjustable-payment/adjustable interest rate loans,⁷ extending the ability to issue variable rate loans,⁸ amending loan insurance⁹ and amortization¹⁰ provisions.¹¹

SHARED APPRECIATION LOANS

A. Comprehensive Scheme

Currently enacted legislation creates two types of shared appreciation loans, one which is a comprehensive package,¹² and one which is applicable only to loans using pension fund capital and the source of funds.¹³ Chapter 1144 enacts a comprehensive scheme for providing

1. See CAL. CIV. CODE §§1917.010-1917.110.

2. See *id.* §§1917.010, 1917.110, 1917.020-1917.074, 1917.120-1917.175.

3. *Id.* §§1917.010(d), 1917.030(e), 1917.110(c).

4. *Id.* §§711, 1917.062(a), (b), 1917.162(a), (b).

5. *Id.* §§1917, 1918, 1919, 1920.

6. *Id.* §§1916.12(a); CAL. FIN. CODE §§1227.1, 7150.1.

7. CAL. CIV. CODE §1916.7.

8. *Id.* §1916.10.

9. CAL. INS. CODE §12640.025.

10. CAL. FIN. CODE §5074.

11. See CAL. CIV. CODE 1916.7, 1916.11, 1916.12; CAL. FIN. CODE §1227, CAL. GOV'T CODE §§11346.1, 11346.2.

12. See CAL. CIV. CODE §§1917.010-1917.075.

13. See *id.* §§1917.110-1917.175.

shared appreciation loans (hereinafter referred to as SAM).¹⁴ The SAM may be used to purchase one-to-four family dwelling units, single-family mobilehome units placed upon permanent foundations, residential condominiums, and dwelling units within a planned unit development.¹⁵ These dwelling units must be owner occupied.¹⁶ Under Chapter 1144, lenders may offer loans at a fixed interest rate¹⁷ which is reduced below the prevailing interest rate¹⁸ by at least one-half of the lender's percentage share of the net appreciated value of the property.¹⁹ This percentage of the net appreciated value is called the "contingent deferred interest."²⁰ The contingent deferred interest becomes payable when the property is sold,²¹ or when the loan is prepaid in full, accelerated²² upon default, or matures, *whichever occurs first*.²³ If financing is for less than eighty percent of the purchase price of the

14. CAL. CIV. CODE §§ 1917.110-1917.175. A SAM is not a variable interest rate loan subject to California Civil Code Sections 1916.5 and 1916.6. OP. CAL. LEGIS. COUNSEL No. 5414 (Mar. 20, 1981). See generally COCKERELL, SHARED APPRECIATION MORTGAGES: LENDER PROFIT SHARING LOANS [hereinafter cited as COCKERELL]; CAL. DEP'T OF CONSUMER AFFAIRS, SHARED APPRECIATION MORTGAGE CONCEPT (Apr. 10, 1981) [hereinafter cited as DEP'T]; REPORT, THE SHARED APPRECIATION MORTGAGE MARKET: FACTORS IMPACTING AB 2168, from Ridgely Evers to Assemblyman Jim Costa (copy on file at the *Pacific Law Journal*). A SAM is not subject to any provisions of the California Civil Code or Financial Code which limits the change of interest of variable, adjustable, or renegotiable instruments. CAL. CIV. CODE §1917.064. See *id.* §1917.680 (applicability of CAL. CORP. CODE §§25110, 25120, 25130).

15. CAL. CIV. CODE §1917.130. SAM FINANCING OF REAL PROPERTY DESCRIBED IN CALIFORNIA CIVIL CODE SECTION 1917.130 MAY ALSO BE MADE PURSUANT TO OTHER PROVISIONS OF LAW RELATING TO SHARED APPRECIATION FINANCING. *Id.* §1917.163. SAMs made pursuant to Chapter 1143 also are restricted to the types of property listed in Chapter 1144. *Id.* §1917.030.

16. Compare *id.* §1917.130 with *id.* §1917.030. Chapter 1144 provides that a dwelling unit shall be considered owner occupied for purposes of California Civil Code Section 1917.130 if within 90 days of the execution of the deed of trust the unit is occupied by a signatory of the deed of trust. *Id.* §1917.130. Under Chapter 1143, the borrower need occupy only one unit of a two-to-four unit dwelling in order to meet the owner occupation requirement. *Id.* §1917.030. Chapter 1143 requires the original recipient of the SAM to certify in writing to the lender that the property shall be used as the principal residence. *Id.* §1917.030. Failure to occupy the property as the principal residence may result in acceleration of the loan. *Id.* §1917.030.

17. *Id.* §1917.131(d). A SAM which at origination bears a fixed rate of interest does not conflict with the California usury laws. See *id.* §1917.167; CAL. CONST. ART. XV.

18. CAL. CIV. CODE §1917.120(g) (prevailing rate defined).

19. *Id.* §1917.131(d). The lender's percentage must not exceed 50 percent. *Id.* §1917.120(c). See *id.* §1917.120(f) (net appreciated value defined). See text accompanying notes 41-43 *infra*.

20. CAL. CIV. CODE §1917.120(c). The principle of contingent deferred interest was recognized prior to the enactment of Chapters 1143 and 1144 and has been applied to exempt certain contracts made in good faith and without intent to avoid the statute against usury from the limitation on the legal rate of interest. *Thomassen v. Carr*, 250 Cal. App. 2d 341, 346-47, 58 Cal. Rptr. 297, 300-01; 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* §392 (8th ed. 1974); RESTATEMENT OF CONTRACTS §527; OP. CAL. LEGIS. COUNSEL No. 5414 (Mar. 20, 1981). See generally R. SWEAT, MORTGAGES AND ALTERNATIVE MORTGAGE INSTRUMENTS (1981). Chapter 1143 specifically exempts lenders from the usury provision of CAL. CONST. art. XV. CAL. CIV. CODE §1917.067.

21. CAL. CIV. CODE §1917.120(i) (sale defined). Payment of the contingent deferred interest upon sale must be made only if the lender accelerates the loan pursuant to California Civil Code Section 1917.162. *Id.* §1917.131(e).

22. See notes 90-95 *infra*.

23. CAL. CIV. CODE §1917.131(e).

property, however, the interest rate may be reduced below the prevailing rate by at least two-thirds of the lender's percentage share of the net appreciated value.²⁴

The SAM results in lower monthly payments due to the decreased interest rate and an amortization schedule of at least thirty years and not more than forty years regardless of the actual term of the loan.²⁵ Thus the annual income of the borrower necessary for loan qualification is reduced.²⁶ Since the SAM may be issued for a term from seven to thirty years,²⁷ however, the loan payments may be amortized over a longer period of time than the loan term.²⁸ As a result, a balloon payment may exist on loans maturing in less than thirty years.²⁹ To pay this balloon payment and the contingent deferred interest that also may be due at loan maturity,³⁰ the borrower may obtain refinancing.³¹ Refinancing is available, however, only if the original loan term is less than ten years, the loan is not prepaid in full, the property is not sold or transferred prior to the loan maturity date, and the borrower is not in default.³² Refinancing must be offered either by the original lender or the lender must make arrangements to have the refinancing provided by a federally or state-chartered bank, savings and loan institution, or a qualified mortgage banker.³³ The loan term for refinancing must be at least thirty years from the date of origination of the SAM unless a thirty year loan is not available.³⁴ In the latter case, the lender may offer refinancing upon any terms generally offered³⁵ by banks or savings and loan associations operating in the state home financing market

24. *Id.* §1917.131(d).

25. *Id.* §1917.131(b).

26. COCKERELL, *supra* note 12, at 4; DEP'T, *supra* note 12, at 1. Enactment of the SAM program is an attempt to provide more affordable means of financing new home construction and marketing in the current high interest loan market. See CAL. CIV. CODE §1917.010(c), (d).

27. CAL. CIV. CODE §1917.131(a).

28. See *id.* §1917.131(a), (b).

29. *Id.* §1917.131(b); COCKERELL, *supra* note 12, at 17; DEP'T, *supra* note 12, at 2.

30. CAL. CIV. CODE §1917.131(e).

31. *Id.* §1917.133. Apparently the borrower is not required to accept refinancing since the loan may be prepaid at any time. *Id.* §1917.132(a), (b), (c).

32. *Id.* §1917.133(a).

33. *Id.* See *id.* (qualified mortgage banks defined). The fact that refinancing has been arranged with a bank, savings and loan association or mortgage banker at the time of loan origination must be disclosed to the borrower and the contract between the lender and the bank, savings and loan association or mortgage banker must be fully enforceable by the borrower as a third party beneficiary. *Id.* The lender, however, shall not be a guarantor of the obligation to the bank, savings and loan institution or qualified mortgage banker. *Id.* If the original SAM lender provides refinancing, its assignees and successors in interest will not be guarantors if the limitation is made part of the SAM agreement and the agreement is fully enforceable by the borrower. *Id.*

34. *Id.* §1917.133(b), (d). The borrower must be informed of the types of loans available within 60 days of the SAM maturity date. *Id.* §1917.133(b).

35. See *id.* §1917.133(b), (d).

at the time of refinancing.³⁶ The interest rate of the refinancing loan must not exceed the rates generally available³⁷ at the time the SAM matures.³⁸

In determining the amount of the contingent deferred interest owed by the borrower, the net appreciated value of the property must be calculated.³⁹ The net appreciated value is the fair market value of the property⁴⁰ less the sum of the borrower's cost of the property⁴¹ and the value of the capital improvements.⁴² The fair market value equals the gross sale price of the property if the sale is for cash.⁴³ If, however, the lender disputes the reasonableness of the gross sale price in writing within ten working days of the lender's receipt of notice of the gross sale price,⁴⁴ the fair market value equals the greater of the gross sale price or the average of two appraisals.⁴⁵ In addition, the average appraisal figure is also used if the property is sold on other than cash terms,⁴⁶ the SAM matures,⁴⁷ the loan is prepaid in full,⁴⁸ or the loan is accelerated upon default.⁴⁹

Chapter 1144 allows the borrower to have the value of capital improvements⁵⁰ made during any twelve month period and resulting in at least a \$2500 increase in the property value⁵¹ added to the borrower's cost for the property⁵² for purposes of determining the net appreciated value⁵³ and the contingent deferred interest,⁵⁴ provided the following conditions are met:⁵⁵ (1) the borrower must notify the lender of the completion and cost of the improvement and submit an estimate of the increased value of the property caused by the improvement within sixty

36. *Id.*

37. *See id.* §1917.133(c), (d).

38. *See id.* §1917.133(c). The interest need not be at a fixed rate. *Id.* §1917.133(d). Refinancing also may be provided upon other mutually agreeable terms. *Id.* §1917.135.

39. *Id.* §1917.120(c), (d), (f).

40. *Id.* §1917.120(d). *See text* accompanying notes 41-47 *infra*.

41. CAL. CIV. CODE §1917.120(b).

42. *Id.* §1917.120(f), (k). *See text* accompanying notes 48-58 *infra*.

43. CAL. CIV. CODE §1917.141(a). The fair market value may, in addition to being used to determine the contingent deferred interest, be used for purposes of facilitating a sale of the property. *Id.* §1917.140.

44. *Id.* §1917.141(b).

45. *Id.* §§1917.141(b), 1917.142.

46. *Id.* §1917.141(c).

47. *Id.* §§1917.141(c), 1917.142.

48. *Id.*

49. *Id.*

50. *See id.* §§1917.120(k), 1917.150-1917.151.

51. *Id.* §1917.150(c).

52. *See id.* §1917.120(b).

53. *See id.* §1917.120(f).

54. *See id.* §1917.120(c).

55. *Id.* §1917.150.

days;⁵⁶ (2) if the lender questions this estimate, the value of the improvement may be set by mutual agreement between the borrower and lender or the lender may require an appraisal of the property to determine the increase in property value resulting from the improvement;⁵⁷ (3) if the appraised option is taken, the increase in value of the property resulting from the improvements is determined by taking the average of two appraisals.⁵⁸ The borrower also may receive credit for improvements when labor or other work was provided by the borrower.⁵⁹ In this case, the cost of the improvements need not exceed \$2500.⁶⁰ Fees may be charged by the lender for processing loan applications, preparing necessary documents, obtaining credit reports, or any other costs incurred by the lender as a result of loan origination.⁶¹ While no prepaid interest may be charged to the borrower, Chapter 1144 allows the lender to charge a fee for providing SAM commitments to builders or other persons who will not be the ultimate purchaser.⁶²

Finally, Chapters 1143 and 1144 require lenders to furnish borrowers a written disclosure of the nature and effect of the SAM instrument.⁶³ This notice must include, in addition to language substantially similar to the model notice provisions provided,⁶⁴ disclosures required by the Federal Reserve Board, to the extent these requirements are applicable.⁶⁵

B. SAMs Utilizing Pension Fund Capital

Special requirements are provided by Chapter 1143 for SAMs utilizing loan capital from pension funds subject to the Employment Retirement Income Security Act.⁶⁶

56. *Id.* §1917.150(a).

57. *Id.* §1917.150(b). Appraisal shall be made by two appraisers selected pursuant to California Civil Code Section 1917.142. *Id.*

58. *Id.* §1917.150(b).

59. *Id.* §1917.150(d). Credit for improvements also may be made according to any other procedure as long as the lender adequately discloses the procedure to the borrower pursuant to California Civil Code Sections 1917.170-1917.175. *Id.* §1917.151.

60. *Id.* §1917.150(d).

61. *Id.* §1917.131(f). Such fees must not exceed two percent of the loan principal or \$500, whichever is greater. *Id.*

62. *Id.* §1917.131(f).

63. *See id.* §§1917.070-1917.075, 1917.131(f), 1917.170-1917.175. This notice must be given to the borrower either when the lender first provides written information concerning the SAM or when the loan application form is given to the borrower, whichever occurs first. *Id.* §§1917.071(a), 1917.171(a).

64. *Id.* §§1917.071(b), 1917.171(b).

65. *See* Subpart C of Federal Reserve Board Regulation Z, 12 C.F.R. Part 226 *See* CAL. CIV. CODE §§1917.072, 1917.172.

66. CAL. CIV. CODE §1917.030. *See* text accompanying notes 66-89 *supra*. *See generally id.* §1917.010(e); PUB. L. NO. 93-406, 88 STAT. 829 (1974); CONTINUING EDUCATION OF THE BAR, CALIFORNIA REAL ESTATE SALES TRANSACTIONS §10.15 (pension funds are the largest untapped source of mortgage money); REPORT, THE SHARED APPRECIATION MORTGAGE MARKET: FAC-

Under Chapter 1143, lenders may offer fixed-rate loans at one-third below the prevailing interest rate⁶⁷ in return for one-third of the appreciated value of the property⁶⁸ that secures the loan.⁶⁹ This percentage of the net appreciated value is called the "contingent deferred interest."⁷⁰ The contingent deferred interest becomes payable when the property is sold,⁷¹ the title is transferred,⁷² a lease with an option to purchase is entered into, a partnership is formed that has the effect of transferring the beneficial ownership to another person, upon a judicial or nonjudicial foreclosure sale, at the time the loan is prepaid in full,⁷³ or upon the maturity of the loan, *whichever occurs first*.⁷⁴

A SAM which is issued for a short term⁷⁵ and which results in a balloon payment⁷⁶ may be refinanced if the SAM is not prepaid in full or the real property is not sold or transferred prior to the loan maturity date.⁷⁷

The term of the refinancing must be at least thirty years from the date of the refinancing.⁷⁸ Furthermore, if the interest rate of the refinancing loan is not adjustable or variable,⁷⁹ the loan may contain a provision allowing the lender to accelerate the principal loan balance.⁸⁰ If accelerated, the principal loan balance and the accrued interest will become due on a date specified in the SAM.⁸¹ The borrower and lender, however, may also provide refinancing upon other mutually

TORS IMPACTING AB 2168, from Ridgely Evers to Assemblyman Jim Costa (copy on file at the *Pacific Law Journal*).

67. CAL. CIV. CODE §§1917.020(b), 1917.031(d). The prevailing rate, *id.* §1917.020 (definition of prevailing rate), must have been in effect 90 days prior to the loan closing date, or at another date between that date and the loan closing if mutually agreed by the lender and borrower. *Id.*

68. CAL. CIV. CODE §1917.020(f) (net appreciated value defined); See text accompanying notes 20-27 *infra* (discussing computation of the net appreciated value).

69. CAL. CIV. CODE §1917.031(e); see *id.* §§1917.065 (lien of deed of trust), 1917.066 (attachment of liens).

70. *Id.* §1917.020(c) (contingent deferred interest defined). See note 19 *supra*.

71. CAL. CIV. CODE §1917.031(e). This includes a sale pursuant to a land sale contract.

72. *Id.* The transfer must be other than as specified in California Civil Code Section 2924.6.

73. See *id.* §1917.032 (right of prepayment discussed).

74. *Id.* §1917.031(e).

75. See *id.* §§1917.031(a) (loan term from seven to thirty years); 1917.031(b) (amortization is made over a 30 year period).

76. COCKRELL, *supra* note 12, at 17; DEP'T, *supra* note 1, at 2.

77. CAL. CIV. CODE §1917.033(a).

78. *Id.* §1917.033(b).

79. *Id.* §§1917.033(e) (the interest rate may be either fixed or adjustable), 1917.033(c) (the interest rate of the refinancing loan shall not exceed the prevailing rate existing at maturity of the SAM).

80. *Id.* §1917.033(b). See text accompanying notes 90-95 *infra* (discussing loan acceleration clauses).

81. CAL. CIV. CODE §1917.033(b). This date must be no earlier than seven years following the date of refinancing. See *id.* §§1917.033(d) (the lender may require as a condition of the refinancing loan that it be secured by a deed of trust or mortgage of first priority), 1917.033(e) (refinancing shall be fully amortized).

agreeable terms.⁸²

For determining the amount of the contingent deferred interest owed, Chapter 1143 provides formulas which differ from those given in Chapter 1144.⁸³ The real property securing the SAM must be appraised annually by an independent appraiser selected by the lender.⁸⁴ The lender may require the borrower to pay for the appraisal.⁸⁵ The appraised value constitutes the value of the property for purposes of determining the adjusted fair market value of the property.⁸⁶ The borrower's cost of the property⁸⁷ is then subtracted from the adjusted fair market value to yield the net appreciated value.⁸⁸ Chapter 1143 also permits the borrower to deduct the cost of capital improvements completed within any twelve month period and having an appraised value in excess of \$2500 from the adjusted fair market value.⁸⁹ The net appreciated value is multiplied by one-third to obtain the contingent deferred interest.⁹⁰

C. Acceleration Clauses

Existing law prohibits due-on-sale clauses.⁹¹ Chapters 1143 and

82. *Id.* §§1917.033(e), 1917.034.

83. Compare *id.* §1917.040-1917.044 with *id.* §§1917.140-1917.144.

84. *Id.* §1917.040. The appraisal shall be performed within 30 days preceeding the anniversary date of the loan and a copy of the current appraisal must be sent to the borrower by first class mail no later than five days following the anniversary date of the loan. *Id.* The copy of the appraisal must be accompanied by a notice stating that the appraisal constitutes the final and conclusive determination of the value of the property for certain purposes and that the borrower may procure an independent appraisal pursuant to California Civil Code Section 1917.041, if he or she disputes the amount given in the notice of appraisal. *Id.*

85. *Id.*

86. *Id.* §1917.043. See *id.* §§1917.020(a) (definition of adjusted fair market value); 1917.041-1917.042 (settlement of disputed appraisal figures).

87. *Id.* §1917.020(b) (definition of borrower's cost of the property).

88. *Id.* §1917.020(f).

89. *Id.* §1917.050. In order to qualify for this deduction, the following procedure must be followed: (1) notice of completion of the improvements and proof of their cost must be submitted to the lender within 60 days following completion of the improvement, *id.* §1917.050(a); (2) the lender must have the improvement appraised within 90 days following the completion of the improvements in order to determine whether an increase in the value of the property has resulted from the improvements, *id.* §1917.050(b); (3) a copy of the appraisal must be sent to the borrower along with notice that the appraisal constitutes final and conclusive determination of the increase in property value for purposes of computing the net appreciated value of the property and that the borrower may procure an independent appraisal pursuant to California Civil Code Section 1917.050(d) if he or she disputes the appraisal amount given in the notice, *id.* §1917.050(b); (4) the borrower must, if he or she disputes the lender's appraisal figure, have the improvement appraised by an independent appraiser within 120 days of completion of the improvement, *id.* §1917.050(c). If the labor or other work on the improvement was performed by the borrower, the appraisal of the increase in value of the property which resulted from the improvement must be the cost of capital improvements for purposes of establishing credit under California Civil Code Section 1917.050.

90. *Id.* §1917.050(f).

91. *Id.* §1917.020(c).

1144, by allowing a due-on-sale clause to be used in SAM financing,⁹² provide exceptions to the existing statutory prohibition against conditions in restraint of alienation.⁹³ Thus, *Wellenkamp v. Bank of America*,⁹⁴ which held that a due-on-sale clause cannot be enforced upon an outright sale unless reasonably necessary to avoid impairment of security or risk of default,⁹⁵ apparently has been statutorily overruled, at least in its application to SAMs.⁹⁶

ADJUSTABLE-PAYMENT, ADJUSTABLE RATE LOANS

Chapter 1079 created a new mortgage loan instrument (hereinafter referred to as ARM) that allows adjustable payments and interest rates on loans secured by owner-occupied real property containing four or fewer units.⁹⁷ The ARM provides for interest rate fluctuation according to a prescribed standard⁹⁸ and for variation in the monthly payments by as much as 7.5 percent annually, depending on the movement of the market interest rate.⁹⁹ Monthly payments also may be established on a graduated basis.¹⁰⁰ If the loan interest rate increases to the extent that the interest accruing during any month exceeds the existing monthly payment,¹⁰¹ Chapter 1079 permits the borrower either to (1) increase the monthly payment to an amount which at least covers the increase in interest;¹⁰² (2) add the difference between the accrued interest and the existing monthly payment to the principal, provided the original loan-to-value ratio is not exceeded;¹⁰³ (3) extend the term of the loan up to a maximum of forty years;¹⁰⁴ or (4) select a combination

92. See *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 953, 582 P.2d 970, 976, 148 Cal. Rptr. 379, 385-86 (1978); CAL. CIV. CODE §711.

93. See *id.* §§1917.062, 1917.162, 1917.163.

94. Compare *id.* §711 with *id.* §§1917.062, 1917.162.

95. 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

96. 21 Cal. 3d 943, 953, 582 P.2d 970, 976, 148 Cal. Rptr. 379, 385-86 (1978).

97. See CAL. CIV. CODE §§1917.062, 1917.162. California Civil Code Section 2924.6 may preclude the operation of this exception, *id.* §§1917.062, 1917.162. See generally OFFICE OF POLICY DEVELOPMENT AND RESEARCH, U.S. DEPT OF HOUSING AND URBAN DEVELOPMENT, AN ECONOMIC ANALYSIS OF DUE-ON-SALE CLAUSES (1980); Crane, *Wellenkamp v. Bank of America: A Victory for the Consumer?*, 31 HASTINGS L. REV. 275 (1979).

98. CAL. CIV. CODE §1916.7. ARM provisions are not subject to California Civil Code Sections 1916.5 (variable rate interest), 1916.6 (periodic change in variable rate interest), 1916.8 (renegotiable rate mortgage loan), 1916.9 (offering fixed rate mortgage loan with offer of renegotiable rate mortgage loan.)

99. *Id.* §§1916.7(b)(5) (prescribed standard described), 1916.7(b)(6).

100. *Id.* §1916.7(b)(2). Changes in the amount of the monthly payment and interest rate may not occur during the first six months of the loan and may occur thereafter only twice during any 12 month period, provided six months have elapsed since the previous change. *Id.*

101. *Id.* §1916.7(b)(3).

102. *Id.* §1916.7(b)(4)(A). This section applies notwithstanding California Civil Code Section 1916.7(b)(2) which limits the frequency of changes in the monthly payment to twice during any 12 month period. *Id.*

103. *Id.* §1916.7(b)(4)(B).

104. *Id.* §1916.7(b)(4)(C).

of these options.¹⁰⁵ Any change in the interest rate, however, must not exceed the limit specified by the lender in the loan contract for rate increases in any semi-annual period or for rate increases greater than the base index rate.¹⁰⁶ Furthermore, if, at the end of a current loan term, remaining principal is due on the loan, the borrower may repay the balance in full or in equal installments over a period not exceeding ten years at a fixed rate of interest.¹⁰⁷ Finally, Chapter 1079 provides the language for a notice that must be included in the loan application designed to fully apprise the borrower of the nature and effect of the ARM.¹⁰⁸

OTHER NON-FIXED RATE LOANS

A. *Loan Insurance*

Existing law provides that a mortgage guaranty insurer may insure certain real property loans to ninety-five percent of the fair market value of the real property.¹⁰⁹ Certain secured loans and experimental mortgage instruments also may be insured to 100 percent of the fair market value.¹¹⁰ Chapter 1079 extends the 100 percent insurance provision to variable interest rate¹¹¹ renegotiable rate,¹¹² and adjustable-payment/adjustable interest rate¹¹³ loans.¹¹⁴

B. *Restrictions on Variable Rate Home Loans*

Chapter 1079 also imposes restrictions on variable interest rate loans secured by owner-occupied real property improved by not more than four dwelling units.¹¹⁵ Prior to the execution of any mortgage instrument subject to the provisions of Chapter 1079, the borrower must have been apprised of the nature and effect of the mortgage payment instrument and of all costs or savings that may be attributed to its use.¹¹⁶ No change in the interest rate of a variable interest rate loan may occur

105. *Id.* §1916.7(b)(4).

106. *Id.* §1916.7(b)(6).

107. *Id.* §1916.7(b)(10). *See id.* §1916.7(b)(8) (ARMS may be prepaid at any time without charge).

108. *Id.* §1916.7(c). *See also id.* §1916.7(c) (notice provisions).

109. CAL. INS. CODE §12640.025.

110. *Id.*

111. *See* CAL. CIV. CODE §§1916.10, 1919, 1920.

112. *See id.* §§1916.8, 1916.9.

113. *See id.* §1916.7.

114. CAL. INS. CODE §12640.025. *See also* CAL. FIN. CODE §7150.1.

115. CAL. CIV. CODE §§1917-1920. California Civil Code Sections 1916.5, 1916.6, 1916.7, 1916.8, 1916.9, 1916.10 and California Financial Code Section 7150.1 and any other provisions of law restricting changes in the rate of interest on loans are not applicable to loans made pursuant to California Civil Code Sections 1917-1920. *Id.* §1919(c).

116. *Id.* §1920(f).

unless the evidence of debt and the security document contain a variable interest rate provision.¹¹⁷ The evidence of debt and the security document also must contain a statement in at least ten-point type to the effect that the mortgage may provide for change in the interest rate, principal loan balance, payment, or loan term.¹¹⁸ These documents also must state that prior to the due date of the first monthly installment following each change in the interest rate, the borrower must be informed of (1) the base index;¹¹⁹ (2) the most recently published index at the date of the change in the interest rate;¹²⁰ (3) the interest rate in effect as a result of the change in the interest rate;¹²¹ (4) any change in the monthly installment payment resulting from the change in the interest rate;¹²² (5) the amount of the unpaid principal balance;¹²³ (6) the fact that the interest rate now exceeds the monthly installment payment and to whom inquiries regarding this matter may be directed.¹²⁴ Finally, loans made under the provisions of Chapter 1079 may be prepaid in full or in part at any time.¹²⁵ No fee or other charge may be required for prepayment or for change in the interest rate, payment, outstanding principal loan balance, or the loan term.¹²⁶

C. Parity Regulation

The operation of banks has become difficult due to inflation, volatile market interest rates, and phasing out of interest rate ceilings.¹²⁷ In addition, there is a critical shortage of affordable loan funds in the state resulting from the difficulty of attracting savings depositors and making loans.¹²⁸ State lenders also are currently at a competitive disadvantage because federal lending institutions operate under regulations allowing for more flexible loan programs.¹²⁹ To solve these problems, new regu-

117. *Id.* §1920(b). Changes in the rate of interest must reflect the movement in an index which is to be authorized by the Secretary of Business, Transportation and Housing or the Secretary's designee. *Id.* §1920(d). See *id.* §§1918(b), (c) (Secretary and Secretary's designee defined).

118. *Id.* §1920(b)(1). The content of this statement shall be authorized by the Secretary or the Secretary's designee. *Id.*

119. *Id.* §1920(b)(2)(A).

120. *Id.* §1920(b)(2)(B).

121. *Id.* §1920(b)(2)(C).

122. *Id.* §1920(b)(2)(D).

123. *Id.* §1920(b)(2)(E).

124. *Id.* §1920(b)(2)(F). The borrower must be notified if the interest accrued exceeds the monthly installment. *Id.* §1920(e). The notice must be on the form and in the manner to be designated by the Secretary or the Secretary's designee and shall include, but is not limited to, the amount by which the interest exceeds the monthly installment and any borrower's options available under these circumstances. *Id.* §1920(e).

125. *Id.* §1920(c).

126. *Id.*

127. CAL. FIN. CODE §1227.1.

128. *Id.* §1227.1(a).

129. *Id.* §1277.1(a)(4), (5).

latory authority has been enacted.¹³⁰

Chapter 1079 places regulatory authority to effect federal-state parity in the loan market.¹³¹ The Superintendent of Banks must make regulations that will authorize state-chartered banks and subsidiaries of bank holding companies to make loans bearing other than a fixed rate of interest upon security of real property if national banks doing business in California also are authorized to do so by federal law.¹³² In addition, Chapter 1079 exempts state-chartered banks and subsidiaries of bank holding companies from existing restrictions¹³³ on interest rate changes on home loans issued in conformance with federal regulations or eligibility standards of governmental loan purchasing agencies.¹³⁴

Chapter 1079 authorizes the Savings and Loan Commission to promulgate regulations allowing state savings and loan associations to make loans bearing other than a fixed rate of interest, if these loans are secured by real property and if the federal savings and loan associations doing business in California also are authorized by federal law or regulations to make such loans.¹³⁵ In addition, savings and loan associations are exempted from existing restrictions¹³⁶ on the change of interest rates for home loans conforming to federal regulations or eligibility standards of governmental loan purchasing agencies.¹³⁷

D. Amortized Loans

Existing law provides that amortized loans¹³⁸ include (1) loans financing the construction of real property¹³⁹ and (2) loans conforming to the requirements for variable rate,¹⁴⁰ renegotiable rate,¹⁴¹ and adjustable-rate/adjustable payment¹⁴² loans.¹⁴³ Chapter 1079 adds to the

130. See text accompanying notes 130-141 *supra*.

131. CAL. FIN. CODE §§1227.1(a)(6), 1227.1(b). *Id.* §§1227.1(a)(1)-1227.1(a)(6) (statement of legislative intent).

132. *Id.* §1227.1(b). See *id.* §§1227.1(c)-1227.1(f) (guidelines for regulations described).

133. See *e.g.*, CAL. CIV. CODE §§1916.5, 1916.6, 1916.8.

134. CAL. FIN. CODE §§1227.1(a)(5), 1227.1(g), §1227.1(h). Upon expiration of this provision, Section 1916.12 will take effect. Conversation with David Milton, Legislative Counsel, Calif. Savings and Loan Ass'n, Oct. 8, 1981 (notes on file at the *Pacific Law Journal*).

135. CAL. FIN. CODE §7150.1(b). See *id.* §§7150.1(a)-7150.1(5), 7150.1(7) (statement of legislative intent); 7150.1(b)-7150.1(f) (nature of the regulations described).

136. See *e.g.* CAL. CIV. CODE §§1916.5, 1916.6, 1916.8.

137. CAL. FIN. CODE §§7150.1(a)(6), 7150.1(g), 7150.1(h). Upon expiration of this provision, Section 1916.12 will take effect. Conversation with David Milton, Legislative Counsel, Calif. Savings and Loan Ass'n, Oct. 8, 1981 (notes on file at the *Pacific Law Journal*).

138. CAL. FIN. CODE §5074. See *id.* (amortized loans defined).

139. *Id.* §5074(a).

140. See CAL. CIV. CODE §§1916.5, 1916.6.

141. See *id.* §1916.8.

142. See *id.* §1916.7. Although California Civil Code Section 1916.7 was listed in the 1980 enactment of California Financial Code Section 5074, Section 1916.7 was not in existence at that time.

143. CAL. FIN. CODE §5074.

definition of amortized loans federally-related mortgage loans,¹⁴⁴ loans made by state savings and loan associations under the parity provisions of Chapter 1079,¹⁴⁵ and loans by state financial institutions made pursuant to regulations granting lending authority equivalent to existing federal powers, privileges and duties.¹⁴⁶

144. CAL. CIV. CODE §1916.10.

145. CAL. FIN. CODE §7150.1.

146. CAL. CIV. CODE §1916.12; CAL. FIN. CODE §5074(c).

Property; agricultural use of land—cancellation of contracts

Government Code §51282.1 (new and repealed); §§51282.2, 51286 (new); §§51280, 51282, 51283.4 (amended).

AB 2074 (Robinson); STATS. 1981, Ch 1095

The Williamson Act¹ was enacted in 1965 to discourage the premature and unnecessary conversion of agricultural land to urban uses² by permitting local governments to establish agricultural preserves³—areas devoted to agricultural, recreational, or open space use.⁴ Persons owning land devoted to agricultural use⁵ located within an agricultural preserve may enter into land preservation contracts with their local government⁶ that will restrict the use of land within the preserve to either agricultural or compatible uses⁷ for the duration of the contract.⁸

The Williamson Act requires that land preservation contracts last a minimum of ten years⁹ and may be terminated either by nonrenewal¹⁰ or cancellation.¹¹ Either the landowner or the local government may

1. *See* CAL. GOV'T CODE §51200 (short title of chapter).

2. *See id.* §51220(c).

3. *See id.* §51230.

4. *See id.* §51201(5)(d).

5. *See id.* §51201(b) (definition of agricultural use).

6. *See id.* §51242.

7. *See id.* §51201(e) (definition of compatible use).

8. *See id.* §51243(a). Land preservation contracts benefit the landowner while at the same time protecting the public's interest in agricultural and open space land. Normally, the demand for agricultural land increases the closer it is located to a developed area. Since California taxes property on the basis of its value in the open market, agricultural land will often be taxed on the basis of its potential for development rather than on the basis of its existing use, and, as the land's development potential increases, so will the landowner's property taxes. By entering into a land preservation contract, the landowner is guaranteed a stable tax base throughout the contract's duration.

9. *See id.* §51244.

10. *See id.* §§51244, 51245.

11. *See id.* §§51281.1-51283.4.

serve notice of nonrenewal¹² but unless timely notice¹³ is served prior to the annual renewal date of the contract,¹⁴ the contract is automatically extended for another year.¹⁵ Timely notice does not immediately terminate the contract; it remains in force for the balance of time remaining under the contract.¹⁶ It is apparent that nonrenewal is not an effective response to changed economic, social, or physical conditions that may demand release of the land from the contract's restrictions because the land's use is restricted for ten years from the nonrenewal date.¹⁷

The California Supreme Court recently stated in *Sierra Club v. City of Hayward*¹⁸ that the Legislature intended to reserve contract cancellation for situations when it would not be inconsistent with the declared purpose of the Williamson Act¹⁹—the protection of the public's interest in agricultural land.²⁰ The Court stated that unless the Williamson Act's cancellation provisions are narrowly construed and explicitly followed, the Act would be rendered ineffective as a land-use control device.²¹

Chapter 1095 clarifies the Williamson Act's cancellation provisions and codifies the analysis used in *Sierra Club*.²² Additionally, Chapter 1095 expands the ability of local governments to approve a contract cancellation²³ while remaining consistent with the legislative purpose underlying the Williamson Act.²⁴ Prior law permitted a local government to approve the cancellation of a contract by finding that (1) the cancellation would not be inconsistent with the purposes of the Williamson Act,²⁵ and (2) the cancellation would be in the public interest.²⁶ Under Chapter 1095, a local government may grant tentative approval to a proposed cancellation by making *either* of these

12. *See id.* §51245.

13. *See id.* (landowner must serve notice 90 days prior to the renewal date; the local government must serve notice 60 days prior to the renewal date).

14. *See id.* §§51244, 51244.5, 51245.

15. *See id.* §51244.

16. *See id.* §51246(a).

17. *See id.* §51244. *See generally* *Sierra Club v. City of Hayward*, 28 Cal. 3d 840, 612 P.2d 180, 171 Cal. Rptr. 619 (1981).

18. 28 Cal. 3d at 840, 623 P.2d at 180, 171 Cal. Rptr. at 619.

19. *See generally id.* at 850-855, 623 P.2d at 182-186, 171 Cal. Rptr. at 621-625.

20. *See* CAL. GOV'T CODE §51220(f).

21. *See* 28 Cal. 3d at 853, 623 P.2d at 18, 171 Cal. Rptr. at 626.

22. *See* CAL. STATS. 1981, c. 1095, §8, at —.

23. *Compare* CAL. GOV'T CODE §51282(a)(1), (2) *with* CAL. STATS. 1965, c. 1443, §1, at 3383 (enacting CAL. GOV'T CODE §51282(a)).

24. *See* CAL. GOV'T CODE, §51220(f) (specifies that the Williamson Act is needed to promote general welfare and protect public interest in agricultural land). *See generally id.* §51220 (legislative findings).

25. *See* CAL. STATS. 1965, c. 1443, §1, at 3383 (enacting CAL. GOV'T CODE §51282(a)).

26. *See* CAL. STATS. 1965, c. 1443, §1, at 3383 (enacting CAL. GOV'T CODE §51282(b)).

findings.²⁷

The requirements necessary to show grounds for cancellation that were set forth in *Sierra Club* are essentially identical to the grounds specified in the Act's prior provisions.²⁸ It appears, however, that the Supreme Court believed that they were not set forth with sufficient explicitness, and, as a result, there was a danger that contracts would be cancelled without the requisite findings being made.²⁹ Chapter 1095 specifies that cancellation is consistent with the purposes of the Williamson Act if the local government finds that (1) the cancellation is not likely to result in the removal of adjacent lands from agricultural use;³⁰ (2) discontinuous patterns of urban development will not occur;³¹ (3) no proximate, noncontracted land³² is available and suitable for the proposed use³³ or that developing the contracted land would result in more contiguous patterns of urban development;³⁴ (4) the alternative use is consistent with the local government's general plan regarding establishment of agricultural preserves;³⁵ and (5) a timely nonrenewal notice has been served.³⁶ To show that cancellation is in the public interest, the local government must find that no proximate, noncontracted land³⁷ is available and suitable for the proposed use³⁸ or more contiguous patterns of urban development would result from development of the contracted land,³⁹ and other public concerns substantially outweigh the objectives of the Williamson Act.⁴⁰

Chapter 1095 recognizes that in the past, the provisions of the Williamson Act may have been applied inconsistently, resulting in present or potential hardships for local governments as well as landowners.⁴¹

27. See CAL. GOV'T CODE §51282(a)(1), (2).

28. Compare CAL. GOV'T CODE §51282 with *Sierra Club v. City of Hayward*, 28 Cal. 3d 840, 854-62, 623 P.2d 185-93, 171 Cal. Rptr. 619, 625-32 (1981).

29. See generally 28 Cal. 3d at 854-62, 623 P.2d at 185-93, 171 Cal. Rptr. at 625-32.

30. See CAL. GOV'T CODE §51282(b)(2).

31. See *id.* §51282(b)(4).

32. See *id.* §51282(c) (defining proximate, noncontracted land as land not restricted by a land preservation contract, located sufficiently close to restricted land so to serve as a practical alternative to restricted land). See also 28 Cal. 3d at 861-62, 623 P.2d at 191-92, 171 Cal. Rptr. 630-31.

33. See CAL. GOV'T CODE §51282(c) (a "suitable" use means that the salient features of the proposed use can be served by unrestricted land. Unrestricted land may be a single parcel or a combination of contiguous or discontinuous parcels). See also 28 Cal. 3d at 861-62, 623 P.2d at 191-92, 171 Cal. Rptr. 630-31.

34. See CAL. GOV'T CODE §51282(b)(4).

35. See *id.* §51282(b)(3).

36. See *id.* §51282(b)(1). See also *id.* §51245 (nonrenewal notice).

37. See 28 Cal. 3d at 861-62, 623 P.2d 191-92, 171 Cal. Rptr. at 630-31 (1981); CAL. GOV'T CODE §51282(c).

38. See *id.* at 861-62, 623 P.2d at 191-92, 171 Cal. Rptr. at 630-31; CAL. GOV'T CODE §51282(b)(2), (c).

39. See CAL. GOV'T CODE §51282(c)(2).

40. See *id.* §51282(c)(1).

41. See *id.* §51282.1(a).

Chapter 1095 therefore establishes a one-time opportunity for affected parties to petition for cancellation of a contract without having to make all findings required by the *Sierra Club* decision as codified by Chapter 1095.⁴² The alternative cancellation provision specifies that all landowners whose land is under contract may file a petition to cancel their contract within 150 days of January 1, 1982, the effective date of Chapter 1095.⁴³ The petition also must be accompanied by a proposal for a specified alternative use of the land.⁴⁴ Tentative approval of the cancellation may be granted if the local government finds that (1) the cancellation and alternative use will not result in discontinuous patterns of urban development⁴⁵ and (2) the alternative use is consistent with the applicable provisions of the local government's general plan which was in effect on October 1, 1981, or was amended after that date.⁴⁶ Tentative approval may be withdrawn if any conditions⁴⁷ or contingencies⁴⁸ are not satisfied within one year of the petition's recordation, although the one year period may be extended for a reasonable period upon finding that the landowner has proceeded with due diligence to fulfill the specified conditions.⁴⁹

42. *See id.*

43. *See id.* §51282.1(c).

44. *See id.* §51282.1(e).

45. *See id.* §51282.1(f)(1).

46. *See id.* §51282.1(f)(2).

47. *See id.* §51283.4(a) (conditions include full payment of cancellation fee). *See also id.* §§51283, 51283.1.

48. *See id.* §51283.4(a) (contingencies include obtaining all permits necessary to commence project).

49. *See id.* §51282.1(g).

Property; eminent domain-relocation expenses

Government Code §§7260, 7263, 7264, 7264.5 (amended).

SB 808 (Foran); STATS. 1981, Ch 385

Support: Department of Finance; Department of General Services

Existing law requires a public entity¹ acquiring real property for public use² to compensate a displaced person³ for relocation expenses and certain other losses.⁴ Prior to the enactment of Chapter 385 the

1. *See* CAL. GOV'T CODE §7260(a) (definition of public entity).

2. *See id.* §7260(g) (definition of public use).

3. *See id.* §7260(c) (definition of displaced person).

4. *See id.* §7262 (enumerating expenses and losses for which displaced person is entitled to compensation). *See generally* 42 U.S.C. §§4601-4655 (1976); CAL. GOV'T CODE §§7260-7266; Comment, *Relocation Assistance in California: Legislative Response to the Federal Program* 3 PAC.

definition of displaced person included tenants or occupants of a dwelling before the acquisition of the property by the public entity, but did not specifically include persons or families of low and moderate income⁵ who are occupants of housing made available to them on a permanent basis by a public agency.⁶ Chapter 385 specifically includes these persons within the definition of displaced person.⁷

Existing law also permits a displaced person who has owned and occupied a dwelling for at least 180 days prior to negotiation for acquisition to receive an additional payment not to exceed \$15,000 to offset increased costs of acquiring a replacement dwelling.⁸ Prior to the enactment of Chapter 385, courts interpreted this provision to allow receipt of the additional payment if a homeowner owned another home but spent considerable time at the acquired dwelling.⁹ Chapter 385 specifies that the acquired dwelling must be the homeowner's permanent or customary and usual place of abode.¹⁰

As a condition to receiving the maximum \$15,000 additional relocation payment, existing law requires the homeowner to have purchased and occupied a replacement dwelling within one year of receiving the final acquisition payment for the acquired home.¹¹ Chapter 385 creates an alternative to this requirement by permitting a displaced owner to enter into a written agreement with the public entity to remain as an occupant in the acquired dwelling.¹² This agreement is made on the condition that the displaced owner will receive the additional payment only upon moving from the dwelling.¹³ In addition, the payment that the displaced person will receive is limited to the amount that would have been received if the replacement dwelling had been purchased one year after receiving final payment for the acquired dwelling.¹⁴ Accordingly, this displaced person is also exempt from the requirement that replacement housing be available before being required to move.¹⁵

L.J. 114 (1972) (relocation assistance provisions were enacted to implement requirements of the Federal Relocation Assistance Act and were extended to all takings of property by public entities through eminent domain).

5. See CAL. HEALTH & SAFETY CODE §50093 (definition of low and moderate income).

6. See CAL. STATS. 1979, c. 748, §1, at 2598.

7. Compare CAL. GOV'T CODE §7260(c) with CAL. STATS. 1979, c. 748, §1, at 2598.

8. See CAL. GOV'T CODE §7263(a), (b), (c). See also *id.* §7264 (Persons not qualifying for the additional payment but who have occupied the dwelling for at least 90 days prior to the negotiation for the acquisition may qualify for a payment not to exceed \$4,000 to be used to offset increased costs of renting or \$2,000 to be used to make a down payment on a new dwelling.).

9. See generally *Albright v. State*, 101 Cal. App. 3d 14, 19, 161 Cal. Rptr. 317, 320, (1980).

10. See CAL. GOV'T CODE §§7263(a), 7264(a).

11. See *id.* §7263(c).

12. Compare CAL. GOV'T CODE §7263(c) with CAL. STATS. 1977, c. 395, §1, at 1391.

13. See CAL. GOV'T CODE §7263(c).

14. See *id.*

15. See *id.* §7264.5(d).

Property; special assessment liens in eminent domain

Code of Civil Procedure §1250.250 (amended).

AB 78 (McAlister); STATS. 1981, Ch 139

Existing law requires that the holder of a lien that secures any special assessment¹ or any bond representing a special assessment be named as a defendant in an eminent domain proceeding.² In lieu of filing an answer to the complaint, however, the holder of the lien may certify to the court a complete description of the lien,³ a description of the property encumbered by the lien,⁴ the balance due on the lien as of the date of the certificate,⁵ and the date each installment payable on the lien is due and the amount of each installment.⁶ Chapter 139 now requires the certification to be made within thirty days after service of the summons and complaint on the lien holder.⁷ In addition, a copy of the certification must be sent by first-class mail to all parties to the proceeding at the time it is made to the court.⁸ Finally, Chapter 139 clarifies that certification by the lien holder constitutes a general appearance to the action.⁹

1. See CAL. CIV. PROC. CODE §1265.250(a) (definition of fixed lien special assessment and special annual assessment).

2. *Id.* §1250.250(b).

3. *Id.* §1250.250(b)(1).

4. *Id.* §1250.250(b)(2).

5. *Id.* §1250.250(b)(3).

6. *Id.* §1250.250(b)(4).

7. *Id.* §1250.250(b).

8. *Id.* §1250.250(c).

9. *Id.*

Property; lis pendens

Code of Civil Procedure §409 (amended).

SB 1083 (Petrus); STATS. 1981, Ch 889

When an action affecting the right, title, interest or possession of real property is pending, existing law permits the affected owner to record a notice of that action with the county recorder, known as a lis pendens.¹ Recordation of a lis pendens provides notice of the pending action to

1. See CAL. CIV. PROC. CODE §409(a). See generally 2 B. WITKIN, CALIFORNIA PROCEDURE ACTIONS §§206-214 (2d ed. 1970).

any party subsequently seeking to obtain an interest in the property.² Chapter 889 requires the party recording the notice of the pendency of the action to first serve a copy of the notice on the other party and all owners of record by first class mail³ and to file a copy in the court where the lawsuit is filed.⁴ Any additional adverse party that is brought into the action also must be served.⁵ These notice requirements must be met and proof of service recorded for the notice of the pendency of the action to be valid against the adverse party or the owner of record.⁶ If there is no known address for service of an adverse party or owner, however, a statement under penalty of perjury indicating that fact may be recorded instead of the proof of service.⁷

2. CAL. CIV. PROC. CODE §409(a). *See* *Contini v. Western Title Ins. Co.*, 40 Cal. App. 3d 536, 542; 115 Cal. Rptr. 257, 260 (1974).

3. CAL. CIV. PROC. CODE §409(b) (The notice must be served by first class mail with return receipt requested and mailed to all known addresses of the adverse party.). *See id.* §1013(a) (procedures for service by mail).

4. *Id.* §409(b).

5. *Id.* *See generally id.* §§472, 473 (amendment permitted by the court).

6. *Id.* §409(c).

7. *Id.*

Property; recordation of restrictions

Government Code §27281.5 (new).

AB 663 (Costa); STATS. 1981, Ch 918

Support: California District Attorneys Association

Existing law provides that any instrument or judgment affecting the title or possession of real property *may* be recorded¹ and such recordation will impart constructive notice of its contents.² The term “instrument” is not limited to the conventional forms such as an agreement for sale, a lease, or an option agreement.³ Thus, any instrument that does, in fact, affect title or possession may be recorded.⁴ Recordation, however, generally does not affect the validity of the instrument.⁵ Chapter 918 requires that on or after January 1, 1982, any restriction placed by a municipality or government on real property not owned by the municipality or government which limits the ability of the property

1. *See* CAL. GOV'T CODE §27280(a).

2. *See generally* *Anderson v. Willson*, 48 Cal. App. 289, 293, 191 P. 1016, 1018 (1920); 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* §§144, 151 (8th ed. 1973 & Supp. 1980) [hereinafter cited as WITKIN].

3. *See generally* CAL. GOV'T CODE §27288 (recordable instruments).

4. *See* WITKIN, *supra* note 2, at §145.

5. *See* WITKIN, *supra* note 2, at §144.

owner or proprietary leasehold owner to convey their interests *must* be recorded⁶ in order to be valid.⁷ A restriction is deemed recorded if a specific reference to a separately recorded document stating the restriction is included in a recorded document that particularly describes the property,⁸ or if a recorded document particularly describes the restricted property so that the document imparts constructive notice of the restriction.⁹ Moreover, Chapter 918 is not to be construed as altering the authority of a state or municipal entity to place restrictions on real property.¹⁰

6. See CAL. GOV'T CODE §27281.5(a).

7. See *id.* §27281.5(b).

8. See *id.* §27281.5(a).

9. See *id.*

10. See *id.* §27281.5(c).

Property; disclosures on sales of residential condominiums

Civil Code §1134 (new).

AB 100 (Harris); STATS. 1981, Ch 811

(Effective July 1, 1982)

Support: California Association of Realtors; Department of Housing and Community Development; Department of Real Estate

Existing law requires sellers of subdivided land¹ to provide prospective purchasers² a public report that discloses certain information relating to the property.³ Chapter 811 provides additional protection to purchasers of a unit⁴ in a converted condominium project,⁵ community apartment project,⁶ or stock cooperative⁷ by requiring the developer to disclose information as soon as practicable before the transfer of title for the first sale of the unit concerning the condition of the property being sold.⁸ Under Chapter 811, the owner or subdivider or their agent

1. See CAL. BUS. & PROF. CODE §§11000, 11004.5 (a condominium project, a stock cooperative and a community apartment project are included within the definition of subdivision and subdivided lands).

2. See 10 CAL. ADMIN. CODE §2795; CAL. BUS. & PROF. CODE §11018.1, 11018.2.

3. See generally 15 U.S.C. §§1701-1702 (sales of condominiums may be subject to the Interstate Land Sales Full Disclosures Laws), 3601-3616 (1976); 10 CAL. ADMIN. CODE §§2790-2819.96; CAL. BUS. & PROF. CODE §§11000-11200; CAL. CIV. CODE §§1350-1370.

4. See CAL. CIV. CODE §1350(2) (definition of unit).

5. See *id.* §1350(3) (definition of project).

6. See CAL. BUS. & PROF. CODE §11004 (definition of community apartment project).

7. See *id.* §11003.2 (definition of stock cooperative).

8. See CAL. CIV. CODE §1134(a) (the disclosure must be made as soon as practical before transfer of title of the first unit). See generally CAL. BUS. & PROF. CODE §§11000-11200; CAL. CIV. CODE §§1350-1370; CAL. GOV'T CODE §§66410-66499.37. One of the most common

must deliver to a prospective buyer⁹ a written statement either listing substantial defects or malfunctions in the major systems¹⁰ of the unit and common areas,¹¹ or disclaiming knowledge of the defects.¹² A disclaimer may be delivered only after the owner or subdivider has made a reasonable inspection of the premises and has not found substantial defects or malfunctions.¹³ Furthermore, if a disclosure of the condition is made subsequent to the execution of the contract to purchase,¹⁴ the purchaser may cancel the contract by written notice¹⁵ within three days after personal delivery or five days after deposit in the mail of the disclosure.¹⁶ Moreover, if disclosure is made subsequent to execution of the agreement, the disclosure must contain a statement of the buyer's right to cancel the contract.¹⁷

A person harmed by a willful failure to carry out the disclosure requirements of Chapter 811 may recover actual damages in addition to any other available remedy.¹⁸ Additionally, Chapter 811 does not limit any other obligation to disclose imposed by law.¹⁹ Finally, failure to make the disclosures required by Chapter 811 will not in itself invalidate a transfer of the title of the condominium property.²⁰

problems associated with the purchase of a condominium conversion is the dissatisfaction with the finished product and unanticipated breakdown of the mechanical, electrical, plumbing, and structural systems. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT *Condominium Conversion Controls* (1979).

9. See CAL. CIV. CODE §1134(c)(3) (definition of prospective buyer).
10. See *id.* §1134(c)(1) (definition of major systems).
11. See *id.* §1350(4) (definition of common areas).
12. See *id.* §1134(a).
13. See *id.*
14. See *id.* §1134(b).
15. See *id.*
16. See *id.*
17. See *id.*
18. See *id.* §1134(d).
19. See *id.* §1134(g).
20. See *id.* §1134(f).

