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MINING FOR GOLD WITH THE CALIFORNIA PUBLIC RECORDS ACT
LOS ANGELES ASSOCIATION OF PROFESSIONAL LANDMEN
LONG BEACH PETROLEUM CLUB, NOVEMBER 18, 2004

I. INTRODUCTION AND OUTLINE.

1. The importance of original documents; Casement story.
2. Nature of the problem; Los Angeles County Recorder.
3. Duties of County Registrar.
4. War story with County Assessor.
5. Guiding principles of the California Public Records Act ("CPRA").
6. Specifics of the CPRA.
7. Recent example of use of CPRA against City of Beverly Hills.

II. THE IMPORTANCE OF ORIGINAL DOCUMENTS.

Roger Casement. A comma in the original document killed him.

III. NATURE OF THE PROBLEM: COUNTY RECORDER.

Land professionals conducting title research in Los Angeles and Santa Barbara Counties are discovering limited access to older public records. Particularity disturbing is the removal of older documents from the Los Angeles County Recorder's Office to an offsite location not

accessible to the public. That presents a problem when land professionals are required to review some of the "ancient" documents in the chain of title that directly affects the energy industry's current rights.

Specifically, the County has started putting old record books on pallets, shrinking wrapping them, and putting them into storage – thus making the records inaccessible. The records include some of the 1800s and earlier 1900s indices, Book of Leases, Book of Oil and Gas Leases, Judgments.

IV. DUTIES OF THE COUNTY REGISTRAR.

General Background Information.

What can be recorded: Any written "instrument" that affects the title to or possession of real property can be recorded if it otherwise conforms to the procedural requirements of the recording laws. Govt. Code § 27280. An "instrument" is "a written paper signed by a person or persons transferring the title to, or giving a lien on, real property, or giving a right to a debt or duty." Govt. Code § 27279.

Statutory authorization: Usually there is a specific statutory authorization to record a document, but many documents can be recorded without statutory justification. 63 Ops. Atty. Gen. 905 (1980) Also, a general law county may provide by ordinance for the recordation of particular documents in addition to those recognized by state law, as long as the procedures for recordation comply with state law. Govt. Code § 27297.6(a).

Sample list of recordable documents:

1. Deeds.
2. Easements.

3. Homestead declarations.

4. Judgments.

5. Leases for term exceeding one year, and any assignment thereof.

6. Lis pendens.

7. Mineral leases.

8. Mineral security interests. (Cal. Uniform Com. Code, § 9501(b); § 9502(b) & (c).)

9. Minerals: contract to sever minerals. A contract for the sale of minerals to be severed by the seller is a contract for the sale of goods within the provisions of the California Commercial Code, and can be recorded.

10. Mining: Notice of location of mining claims and affidavit of work. (Govt. Code §§ 27282, 27284.)

11. Oil and gas lease security interest. (Cal. Uniform Com. Code § 9501(a), § 9502(b).)

12. Oil rights and royalties, assignments. (La Laguna Ranch Co. v. Dodge (1941) 18 Cal.2d 132, 139.)

Selected Statutes.

Govt. Code § 27201: Acceptance of documents for recordation.

"(a) The recorder shall, upon payment of proper fees and taxes, accept for recordation any instrument, paper, or notice that is authorized or required by statute or court order to be recorded, if the instrument, paper, or notice contains sufficient information to be indexed as provided by statute, meets recording requirements of state statutes and local ordinances, and is

photographically reproducible. The county recorder shall not refuse to record any instrument, paper, or notice that is authorized or required by statute or court order to be recorded on the basis of its lack of legal sufficiency."

. . . .

Govt. Code § 27280: Instruments and judgments recordable.

"(a) Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter."

. . . .

Govt. Code § 27322: Manner of recording.

"The recorder shall record by legible handwriting, by typewriting, or by photographic reproduction process, in well-bound books or by such other means as provided in this chapter, all instruments, papers and notices the recording of which is required or permitted by law."

Civil Code § 1170: Time instrument deemed recorded.

"An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the Recorder's office, with the proper officer, for record."

Civil Code § 1172: Recorder's duties.

"The duties of county recorders, in respect to recording instruments, are prescribed by the Government Code."

Civil Code § 1213: Record of conveyances, constructive notice.

"Every conveyance of real property or an estate for years therein acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and

mortgagees; and a certified copy of such a recorded conveyance may be recorded in any other county and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance and where the original conveyance has been recorded in any county wherein the property therein mentioned is not situated a certified copy of the recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in that county."

Selected Case Law.

The purpose of recordation is to give constructive notice to the world of the fact or content of a recorded document.

> "Men of ordinary prudence will use all reasonable means to ascertain the state and condition of their own titles. Hence, we may lay it down as a rule, founded upon the experience of mankind, that one who has knowledge of the existence of a deed, **to which he has access**, and which affects the title to property in which he is interested, will, in equity, be presumed to have knowledge of the contents of the deed. **Under our recording system a deed duly recorded is constructive notice to all the world**; and the law conclusively presumes that every person interested has knowledge not only of the deed, but of its precise language, where that is material."

Sisk v. Caswell (1910) 14 Cal.App. 377, 391, citing Hamilton v. Nutt, 34 Conn. 501.

See also Pacific States Savings & Loan Co. v. Strobeck (1934) 139 Cal.App. 427, 435 (chattel mortgage "recordation imparted notice of its contents to the world").

"The system for public recording of land title records was established by statute. (See Gov.Code, § 27201 et seq.) The proper operation of that system is hence one of legislative intent. [¶] A county recorder is obligated to accept for recordation only those documents which

are 'authorized or required by law to be recorded.' (Gov.Code, § 27201.)" Ward v. Superior Court (1997) 55 Cal.App.4th 60, 66.

I would argue to the County Recorder that implicit in the concept of recordation is that the document be accessible to effectuate the "proper operation of the system," i.e., to impart information and give notice of title, rights, and obligations. Eliminating access to documents frustrates "proper operation of the system."

A 1994 case has an interesting summation of the law:

> "It is a common misperception, which the trial court evidently shared, that a recorded document imparts constructive notice from the moment it is recorded. That is not the law. The operative event is actually the indexing of the document, and that did not occur until the day after the Lewises acquired title.
>
> "The most recent in a long line of authorities stating this principle is Hochstein v. Romero (1990) 219 Cal.App.3d 447, 268 Cal.Rptr. 202: "[B]efore the constructive notice will be conclusively presumed, the document must be 'recorded as prescribed by law.' (Civ.Code, § 1213.) A document not indexed as required by statute (see Gov.Code, §§ 27230-27265), does not impart constructive notice because it has not been recorded 'as prescribed by law.'" (Id. at p. 452, 268 Cal.Rptr. 202.) The court explained the principle, citing such authorities as Witkin and Miller & Starr: "'The policy of the law [requiring recordation and indexing] is to afford facilities for intending purchasers ... in examining the records for the purpose of ascertaining whether there are any claims against [the land], and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments, and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If [improperly indexed], it is to be regarded the same as if not recorded at all.' [Citation.] Thus, it is not sufficient merely to record the document. 'California has an "index system of recording," and ... correct indexing is essential to proper recordation. [Citations.]' [Citations.]" (Original emphasis.) (Hochstein v. Romero, supra, 219 Cal.App.3d at p. 452, 268 Cal.Rptr. 202.)

> "The reason for this rule is obvious. The courts have long recognized that constructive notice is a "fiction" (Richardson v. White, supra, 18 Cal. at p. 106), so if a recorded document is going to affect title there must at least be a way for interested parties to find it: "The California courts have consistently reasoned that the conclusive imputation of notice of recorded documents depends upon proper indexing because *a subsequent purchaser should be charged only with notice of those documents which are locatable by a search of the proper indexes.*" (Emphasis added.) (Hochstein v. Romero, supra 219 Cal.App.3d at p. 452, 268 Cal.Rptr. 202.)"

Lewis v. Superior Court (1994) 30 Cal.App.4th 1850, 1866-1867.

V. WAR STORY WITH TAX ASSESSOR.

Los Angeles County Tax Assessor has destroyed all documents pre-1996. That includes payment schedules and copies of checks for payment of property taxes. They are not retained on microfilm.

VI. GUIDING PRINCIPLES OF THE CALIFORNIA PUBLIC RECORDS ACT ("CPRA").

The Legislature has declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Govt. Code § 6250 (emphasis added).

"Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process . . . ." CBS, Inc. v. Block (1986) 42 Cal.3d 646, 651.

The CPRA was enacted against a "background of legislative impatience with secrecy in government . . . ." San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 771-772.

Filarsky v. Superior Court (2002) 28 Cal.4th 419 held that the CPRA "was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies." Id. at 425.

As recently noted in Los Angeles Times Communications LLC v. Los Angeles County Board of Sup'rs (2003) 112 Cal.App.4th 1313: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. . . ." Id. at 1317, quoting Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, 572, 100 S.Ct. 2814 (C.J. Warren Burger).

VII. SELECTED SPECIFICS OF THE CPRA.

"The burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality." City of San Jose v. Superior Court (1999) 74 Cal.App.4th 1008, 1018 (emphasis added).

CPRA is modeled upon federal Freedom of Information Act (FOIA), and Court of Appeals may look to legislative history and judicial construction of FOIA as aid in interpreting Public Records Act.

Under CPRA, fact that public record may contain some confidential information does not justify withholding entire document. State Bd. of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177.

Under CPRA, burden of showing that request for documents is too onerous lies with government agency. State Bd. of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177.

CPRA does not require that records request impose no burden on government agency; Act contemplates there will be some burden in complying with request, the only question being whether burden is so onerous as to clearly outweigh public interest in disclosure. State Bd. of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177.

Any alleged exemptions to disclosure "are construed narrowly to ensure maximum disclosure of the conduct of governmental operations." New York Times v. Superior Court (1990) 218 Cal.App.3d 1579, 1585.

"The general policy of disclosure reflected in the act can only be accomplished by narrow construction of the statutory exemptions." Fairley v. Superior Court (1998) 66 Cal.App.4th 1414, 1420 (internal cits. om.). "[T]he whole purpose of the CPRA is to shed public light on the activities of our governmental entities . . . ." Id. at 1422.

If an agency attempts to withhold documents under the "catch-all exemption" of Govt. Code § 6255(a): "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the ***facts*** of the

particular case the public interest served by not disclosing the record ***clearly outweighs*** the public interest served by disclosure of the record." Govt. Code § 6255(a) (emphasis added).

"A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records." CBS, Inc. v. Block (1986) 42 Cal.3d 646, 652.

California State University v. Superior Court (2001) 90 Cal.App.4th 810, required production of documents related to the construction of a public arena on public land: "The unsupported statements [in the government's declarations] constitute nothing more than speculative, self-serving opinions designed to preclude the dissemination of information to which the public is entitled." Id. at 835.

Govt. Code Section 6254(a) provides that:

> "nothing in this chapter shall be construed to require disclosure of records that are . . . [p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure." (Emphasis added.)

The qualifier, "that are not retained . . . in the ordinary course of business," means that drafts and other memoranda which are retained in the ordinary course of business – as all of these documents were – are presumptively subject to disclosure.

"[C]ompiled factual material or purely factual material contained in deliberative memoranda and severable from its context . . . [are not exempt from disclosure]." Citizens for a Better Environment v. Department of Food and Agriculture (1985) 171 Cal.App.3d 704, 713; EPA v. Mink (1973) 410 U.S. 73, 87-89.

Under the CPRA, the term public inspection "[n]ecessarily implies general, nonselective disclosure. It implies that public officials may not favor one citizen with disclosures denied to another." Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 656. "The Public Records Act denies public officials any power to pick and choose the recipients of disclosure." Id.

VIII. EXAMPLE OF USE OF CPRA AGAINST CITY OF BEVERLY HILLS.

Lawsuit filed on January 13, 2004.

Judgment in our favor granted on June 29, 2004. Writ of mandate issued.

Beverly Hills ordered to disclose hundreds of pages of secret documents about economic and environmental impacts of controversial land use project.

Court ordered City to pay us $70,00 in attorney fees on October 18, 2004.

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