

CALIFORNIA PRACTICE GUIDE REAL PROPERTY TRANSACTIONS 2024 UPDATE

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It's been another eventful year! Among the many changes, the Legislature enacted the Affordable Housing on Faith and Higher Education Lands Act of 2023, sellers who accept offers for the sale of single-family residential property must, among other things, disclose room additions and structural modifications, as statutorily specified, and the California Supreme Court determined in a case of “first impression” that an exclusive, implied easement precluding a servient owner from making the most practical use of the easement’s area is permissible.

These Highlights summarize the most significant developments over the past year. The paragraph numbers are keyed to the 2024 edition of the Practice Guide where the topics are discussed in greater detail. Our cut-off date for this Update was July 30, 2024. Some of the new cases cited were not final as of that date, so be sure to check the subsequent histories before citing or relying on them.

Thank You! As always, we appreciate your comments and suggestions regarding this Practice Guide. *Please keep them coming!*

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2024 UPDATE HIGHLIGHTS

CHAPTER 2

REAL ESTATE BROKERS AND LISTING AGREEMENTS

Disclosure Obligations

[2:214-214.1] **Room additions, structural modifications, alterations, or repairs made by contractors:** On or after July 1, 2024, a seller who accepts an offer for the sale of a single-family residential property within 18 months from the date title to the property was transferred to the seller must, among other things, disclose to the buyer any room additions, structural modifications, other alterations, or repairs made to the property by a contractor with whom the seller entered into a contract since the transfer of title. [New Civ.C. §1102.6h]

CHAPTER 3

TITLE INSURANCE

Policy Liability

[3:372] **Insured owners; measuring differential value damages:** One case has concluded that loss should be based on the diminution in a property's value according to its "*highest and best use*" as of the date the covered defect is discovered. [*Tait v. Commonwealth Land Title Insurance Co.* (2024) 103 CA5th 271, —, 322 CR3d 877, 888]

CHAPTER 4

PURCHASE AND SALE AGREEMENT

Mineral, Oil and Gas Rights

[4:53.1] **Reserved:** The holders of mineral rights in 19 parcels of land were entitled to a one-half interest in the sand and gravel extracted by the surface estate owners. Reason: The sand and gravel had commercial value, could be mined, and had been mined in the area since the 1920s. [*Vulcan Lands, Inc. v. Currie* (2023) 98 CA5th 113, 117, 123, 316 CR3d 494, 497, 502]

Covenants Running with the Land

[4:66.2] **Recordation of planned community CC&Rs:** A tree-cutting covenant contained in the original recorded declaration that established a subdivision's general plan did not bind the purchaser of property that was not described therein. [*Colyear v. Rolling Hills Community Ass'n of Rancho Palos Verdes* (2024) 100 CA5th 110, 125-127, 31 CR3d 805, 817-818 (certified for partial publication)]

Public Permits

[4:69.2] **Short-term rentals (STRs) in coastal zone:** An online marketplace that connected residential STR owners with renters was neither directly nor vicariously liable for allowing STR owners to list and rent unpermitted STRs on its website. [*Coastal Protection Alliance, Inc. v. AIRBNB, INC.* (2023) 95 CA5th 207, 212, 215-219, 313 CR3d 262, 265, 267-271]

Laws Facilitating Higher Density Housing

[4:89.7] **Residential development on land owned by higher education or religious institutions:** The Affordable Housing on Faith and Higher Education Lands Act of 2023 provides a streamlined, ministerial process for approving housing development projects that meet specified criteria with respect to land owned by independent higher education or religious institutions. Projects that meet all the Act’s specific criteria are deemed a “use by right” on the land. [New Gov.C. §65913.16]

Exclusive Implied Easements

[4:102.1c; 4:102.2; 4:102.4j] **Permissibility:** Although not favored, the California Supreme Court has determined in a case of “first impression” that an exclusive implied easement precluding a servient owner from making the most practical use of the easement’s surface area is permissible. [*Romero v. Shih* (2024) 15 C5th 680, 687-688, 317 CR3d 478, 481]

Prescriptive Easements

[4:102.16] **Judicial determination requirement:** Although a judicial determination ordinarily is required before a prescriptive easement can arise, the California Coastal Commission did not err in relying on its own staff report when it concluded the public “very likely” acquired a prescriptive right to use an existing trail situated over private property. [*Cave Landing, LLC v. California Coastal Comm’n* (2023) 94 CA5th 654, 656-657, 659, 312 CR3d 447, 448, 440]

Sale of Real Property Negotiated at Settlement Conference

[4:263.2] **Enforceability under CCP §664.6:** A settlement term sheet entered into between a commercial landlord and its cannabis dispensary tenant following mediation was fully enforceable under CCP §664.6. However, an unauthorized prejudgment interest award that differed “materially” from the parties’ agreement was reversed. [*BTHHM Berkeley, LLC v. Johnston* (2024) 100 CA5th 1220, 1222, 1225-1226, 319 CR3d 853, 853, 855-856 (certified for partial publication)]

Written Agreements

[4:270.4; 4:270.6; 4:270.7] **Parol evidence:** With the help of parol evidence, a hand-written deal to purchase multiple gas stations was deemed sufficiently definite for judicial enforcement even though it (i) failed to indicate whether the transaction included only the parties or also their business entities, (ii) used “X” to denote a price-related term, and (iii) failed to identify the stations’ locations. [*Tiffany Builders, LLC v. Delrahim* (2023) 97 CA5th 536, 545-547, 315 CR3d 582, 588-590]

Attorney Fees

[4:516] **Civ.C. §1717 reciprocal prevailing party fee recovery right in actions “on the contract”:** See ¶11:138 & 11:138.2a of the *Highlights Summaries*.

CHAPTER 5

ENVIRONMENTAL HAZARDS LIABILITY

Federal Clean Water Act (CWA, 33 USC §1251 et seq.)

[5:21] “**Citizen suits**”: An environmental organization’s “citizen suit” against a miner who committed ongoing CWA violations by operating a suction dredge in a river without a proper CWA permit was upheld. [*Idaho Conservation League v. Poe* (9th Cir. 2023) 86 F4th 1243, 1244]

California Superfund (Remediation and Clean-Up Liability)

[5:29] **Disclosure requirements**: A lease provision limiting a commercial landlord/owner’s liability was invalid and therefore did not preclude a tenant/lessee’s damages award. Reason: The provision necessarily violated the landlord/owner’s statutory duty to disclose the presence of asbestos on the leased property. [*Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC* (2024) 99 CA5th 44, 49-50, 57, 317 CR3d 573, 577, 583-584]

Resource Conservation and Recovery Act (RCRA, 42 USC §6901 et seq.)

[5:125.10] “**Citizen suits**”: An environmental group’s suit against the U.S. Forest Service for allegedly *contributing* to the contamination of a national forest through the disposal of hazardous lead ammunition by hunters was denied. [*Center for Biological Diversity v. United States Forest Service* (9th Cir. 2023) 80 F4th 943, 946-955]

CHAPTER 6

FINANCING AND APPRAISALS

Government Loans and Grants

[6:22.8] **CalHome Program**: Commencing January 1, 2024, units within home ownership development projects that are receiving CalHome funds must be initially sold to and occupied by lower income households. [Amended Health & Saf.C. §50650.3(c)(3)]

Promissory Notes

[6:241; 6:242.2] **Attorney Fees and Costs of Collection (Civ.C. §1717)**: See ¶11:138 of the *Highlights summaries*.

Personal Property Security Agreements

[6:495] **Signed record**: Security agreements must be *signed by the debtor* (borrower). And “sign” means to execute or adopt a tangible symbol, or attach an electronic symbol, to a record with present intent to authenticate or adopt the record. [Amended Comm’l C. §§9203(b)(3)(A) & 1201(b)(37)]

CHAPTER 7

GROUND LEASEHOLDS

Tax Concerns

[7:267.2] **Sale of property subject to lease**: See ¶13:70 of the *Highlights summaries*.

CHAPTER 11

REMEDIES IN PURCHASE AND SALE TRANSACTIONS

Attorney Fees

[11:138; 11:138.2a] **Civ.C. §1717 reciprocal prevailing party right of recovery in actions “on the contract”:** It was error to deny §1717 fees to a homeowner seeking rescission of loan agreements that impermissibly limited the fee provisions to judicial foreclosure actions. [*Andrade v. Western Riverside Council of Governments* (2024) 99 CA5th 1020, 1026-1027, 318 CR3d 396, 401-402]

Lis Pendens Expungement

[11:708] **Based on failure to establish “probable validity” of underlying claim:** It was error to apply a prima facie standard in determining whether a commercial property purchaser established her claim’s probable validity. Reason: The party who records a lis pendens must show by a *preponderance of the evidence* that the underlying action is “probably valid.” [*De Martini v. Sup.Ct. (Gupta)* (2024) 98 CA5th 1269, 1278-1280, 317 CR3d 441, 448-449]

[11:735] **Refiling prohibited:** A commercial property purchaser was required to obtain court permission before filing a second lis pendens in a subsequent action following the vendor’s successful expungement of the purchaser’s original lis pendens in an earlier related action. [*De Martini v. Sup.Ct. (Gupta)* (2024) 98 CA5th 1269, 1276-1277, 317 CR3d 441, 446-447]

CHAPTER 13

REAL PROPERTY PURCHASE AND SALE TAX CONCERNS

Change in Ownership

[13:70] **Lessor transfers subject to leases of less than 35 years:** A change in ownership was triggered where a property lessor’s lease term was less than 35 years even though the lessor was the property’s original owner. [*Equinix LLC v. County of Los Angeles* (2024) 101 CA5th 1108, 1117-1118, 320 CR3d 803, 809]

[13:78] **Transfers involving entities:** The California Supreme Court has confirmed a “change in ownership” is measured by proportional beneficial ownership interests in corporate *real property* and cannot be limited to an analysis of voting stock only. [*Prang v. Los Angeles County Assessment Appeals Bd. (Amen)* (2024) 15 C5th 1152, 1168, 1176-1179, 321 CR3d 351, 358, 364-366]

\$7000 Homeowner’s Exemption

[13:96.8a] **Owners confined to hospitals or other care facilities:** If persons receiving the homeowner’s exemption are not occupying certain statutorily specified dwellings because they are confined to a hospital or other care facility, they may still be eligible for the homeowner’s exemption. [Amended Rev. & Tax.C. §218(b)(4)]

Property Damaged/Destroyed by Disaster

[13:107] **Base-year value transfers:** The five-year period for

transferring the base-year value of damaged or destroyed property to comparable property is extended by *three years* provided the original property was substantially damaged or destroyed on or after November 1, 2018, but on or before November 20, 2018. [Amended Rev. & Tax.C. §69(i)]

Foreclosure

[13:117] **Public auctions:** If a property owner defaults on its property tax obligations, the county tax collector can sell the property to the highest bidder in a public auction (Rev. & Tax.C. §3691 et seq.). Although the auction might produce a price that exceeds the amount of property tax owed, the original owner is entitled to the difference between the property tax due and the proceeds from the foreclosure. [*Tyler v. Hennepin County, Minnesota* (2023) 598 US 631, 647, 143 S.Ct. 1369, 1380]

Charitable Contributions of Conservation Easements

[13:394.4a] **Extinguishment clauses:** A majority of the Tax Court has reversed its own ruling that was upheld on appeal by concluding Treas.Reg. §1.170A-14(g)(6)(ii) is invalid under the Administrative Procedure Act (APA). [*Valley Park Ranch LLC v. Commissioner* (2024) 162 T.C. No. 6]

Moreover, the Supreme Court’s 2024 decision overturning the *Chevron* Doctrine could affect any appellate court decision. [See *Loper Bright Enterprises v. Raimondo* (2024) — US —, —, 144 S.Ct. 2244, 2273—per APA, courts may not defer to agency’s legal interpretation simply because statute is ambiguous]

Valuation

- [13:394.7a] **Inventory issue:** The IRS has challenged some deductions on the ground the donated property was inventory in the taxpayer’s hands and therefore either sold in violation of the five-year disposition rule or excluded from the capital asset definition. [See *Glade Creek Partners, TC Memo 2023-82*; *Mill Roads 36 Henry, LLC v. Commissioner, TC Memo 2023-129*; *Oconee Landing Property LLC v. Commissioner, TC Memo 2024-25*]
- [13:394.7b] **Qualified appraisal requirement:** Some courts, but not all, have accepted almost any appraisal as evidence for valuation purposes. [See *Elgin 78 LLC v. Commissioner, No. 26892-21 (T.C. 2024)* (accepting appraisal despite numerous omissions); compare *Savannah Shoals LLC v. Commissioner, TC Memo 2024-35* (rejecting “qualified appraisal” where conclusions were inconsistent with facts)]
- [13:394.9] **Listed transactions:** The 11th Circuit has upheld a district court’s holding that struck down the IRS’s syndicated conservation easements listing notice. Reason: The notice failed to comply with the Administrative Procedure Act’s notice and comment requirements. [*Green Rock, LLC v. Internal Revenue Service* (11th Cir. 2024) 104 F4th 220, 222]
- [13:394.12] **Penalties:** Disclosing a taxpayer’s cost basis in donated property may negate the intent to conceal which is necessary for a fraud penalty. [*Mill Road 36 Henry, LLC v. Com-*

missioner, TC Memo 2023-129]

On the other hand, doing so may not be enough on its own if there are other indicia of fraud. [*North Donald LA Property LLC v. Commissioner*, No. 24703-21 (TC 4/10/24)]

Timing of Recognition of Income, Gain or Loss

[13:514.3] **Common Improvement Costs:** For common improvement costs, which include improvements to real property that benefit two or more properties for sale (e.g., streets, sidewalks, sewer lines, etc.), developers may use an optional “safe harbor” method of accounting called the “Alternative Cost Method.” [See Rev.Proc. 2023-9, 2023-7 IRB 471]