

## Memorandum 85-10

Subject: Study H-406 - Abandoned Easements (Comments on Tentative Recommendation)

The Commission circulated for comment its tentative recommendation on abandoned easements. The effect of the tentative recommendation is to provide a quiet title action to terminate of record an easement unused for 20 years. An easement owner would be able to preserve the easement indefinitely without using it by recording a notice every 20 years.

The comments received on the tentative recommendation are attached as Exhibits 1 to 5. In general, Henry Angerbauer (Exhibit 1) agrees with the proposals. Scott C. Verges (Exhibit 4) feels the legislation would be beneficial, but has several problems that should first be resolved. Southern California Edison Company (Exhibit 5) also supports the effort to facilitate clearing abandoned easements from record title, but suggests that public utility easements be excepted from the legislation. Professor Lazerow (Exhibit 2), on the other hand, recognizes the need for abandoned easement legislation but does not believe the tentative recommendation will be effective to accomplish the needed reforms. Specific points are discussed below.

§ 887.010. "Easement" defined

Section 887.010, by defining "easement", defines the scope of the statute and limits it to affirmative easements. Scott C. Verges (Exhibit 4) notes that this may not be sufficiently limited. He points out there may be non-exclusive easements in condominium CC&Rs and reciprocal easements pursuant to agreement, designed for the mutual benefit of multiple parties. Problems would be caused if such an easement were deemed abandoned as to one but not all parties.

The staff agrees. Planned developments and their sets of interrelated easements and servitudes are really beyond the scope of the current recommendation, possibly the subject of a separate recommendation in the future. We would exclude from the easement statute "easements that are a part of a unified or reciprocal system for the mutual benefit of multiple parties." This exclusion, though necessarily imprecise, should

be sufficient for our purposes since termination under the statute will be by the court in a quiet title proceeding.

§ 887.020. Common law of abandonment not affected

Mr. Verges also suggests that the statute should not affect any procedure for clearing an abandoned easement from record title provided by statute "or otherwise." We are not sure what non-statutory procedures Mr. Verges may have in mind, but we suppose it would not hurt anything to add the suggested language. It is conceivable there may be common law remedies in cases where the statute is silent.

§ 887.030. Action authorized

Section 887.030 provides for clearing record title by means of a quiet title proceeding. Professor Lazerow (Exhibit 2) is concerned that this will not provide relief in cases where it is difficult to ascertain the owner of the abandoned easement. "Since no action can be brought, the easement cannot be foreclosed."

Professor Lazerow apparently fails to recognize that the California quiet title statute was revised some years ago (on Commission recommendation) to specifically take care of the situation he is concerned about. The statute permits clearing title against "all persons unknown." Code Civ. Proc. §§ 762.020, 762.060. It is for this very reason that the abandoned easement statute incorporates the quiet title procedure.

§ 887.040. Abandonment

Subdivision (a) of Section 887.040 defines abandonment of an easement in terms of nonuse of the easement for a period of 20 years immediately preceding commencement of the action to terminate. Professor Lazerow believes the easement should be deemed abandoned if it is unused for a period of 20 consecutive years at any time; otherwise the easement owner who has left it unused for a long time might suddenly start to use it again when the servient owner begins to make inquiries prior to terminating it.

The staff believes the policy of the statute should be to preserve easements that an owner is interested in preserving. If there is an owner who can be located and who wishes to preserve the easement, whether by recording or by occasional use, the law should not seek to confiscate this property interest. We believe that the purpose of the statute should be limited to terminating truly abandoned easements where the

owner cannot be found or is uninterested in taking any steps to preserve it. In other cases, the parties can negotiate and extinguish the easement in a market transaction.

Subdivision (c) of Section 887.040 requires that for a recorded instrument to have a preserving effect for an easement, it must make specific reference to the easement. Mr. Verges is concerned that this requirement may cause grantees to insist that a conveyance of property include an express grant of each easement benefiting the property, resulting in unreasonably cumbersome conveyancing documents and sale transactions in general. The staff agrees with this point and would delete subdivision (c).

#### § 887.050. Preservation of easement

Subdivision (b) of Section 887.050 permits the owner of an easement to record a notice of intent to preserve the easement by making a single recording in a county for all easements of the owner in that county. This provision is necessary because large easement holders such as public utilities will face a tremendous task in attempting to record for each easement they own and will face a substantial risk of inadvertent failure to record as to a particular easement.

Professor Lazerow is troubled by this provision "because the result will be that a utility will record a reservation of easement in each county in which it does business without really evaluating whether it has any desire to continue to use the easement." While the staff believes the professor is correct, we also believe the provision is essential, unless we except public utilities from the operation of the statute altogether. This is suggested by Southern California Edison Company (Exhibit 5). The staff is unwilling to except public utilities unless some means can be devised to distinguish viable from defunct utility companies. We are working with Southern California Edison on this, but unless we can come up with something satisfactory, we believe the mass recording provision must be kept.

Subdivision (c) of Section 887.050 refers to a notice of intent to preserve an easement recorded after commencement of an action to terminate the easement. Judge Harlan K. Veal suggests that this reference be made more definite and certain by making clear that the recordation must occur "before judgment is entered" in the action. This is clearly what is intended by the statute, and the staff sees no lack of definiteness

or certainty, but we have no difficulty with adding the suggested language if it will clear up a perceived ambiguity.

#### § 887.060. Late recordation

Section 887.060 permits the easement owner to make a late recordation of notice of intent to preserve an easement upon payment of the servient owner's litigation expenses. Professor Lazerow objects that the "ability of the dominant owner to buy off the easement for costs of suit will result in few quiet title actions being brought to extinguish these easements." The staff disagrees. Once again, our conception of the purpose of the statute is not to defeat an easement owner who wishes to keep the easement but to enable the burdened estate to be cleared of the easement where the easement owner is unknown or cannot be located. The ability to make a late filing serves to protect legitimate property interests without defeating the purpose of the statute.

#### Public entity exception

General provisions of the Marketable Record Title statute except from its operation an interest of a public entity in real property. Professor Lazerow argues that publicly-owned easements should not be excepted from the easement legislation. "I question whether it is as easy and inexpensive to negotiate an agreement with a public entity to give up an easement no longer necessary as you assert in the last sentence of the commentary. Most city officials are inclined to not assent."

We are not sure of the basis for these facts. Our experience in drafting the statute on abandonment of streets and highways and public service easements a few years back was that public entities are eager to be rid of surplus property and the attendant liability exposure. In any case, the basis of the public entity exception is that a public entity exists perpetually and can always be located. If the entity wishes to preserve an unused easement for future use by the public, this should not be discouraged.

The staff believes the tentative recommendation on abandoned easements is sound. We would modify the definition of "easement" to exclude reciprocal easements and other unified systems for the mutual benefit of multiple parties, add language relating to statutory "and other" procedures for clearing title, delete the provision requiring specific reference to an easement in a conveyance of the underlying property, and add a

reference to late recording of a notice of intent to preserve "before judgment is entered" in an action. As so revised, we would submit the recommendation to the Legislature.

Sincerely,

Nathaniel Sterling  
Assistant Executive Secretary

## EXHIBIT 1

HENRY ANGERBAUER, CPA  
4401 WILLOW GLEN CT.  
CONCORD, CA 94521

11/26/84

Law Revision Commission

Gentlemen:

I have read your tentative recommendation relating to Abandoned Easements and I agree with your proposals and ~~conclusions~~ conclusions and suggest you recommend the proposal to the legislature. Many thanks for permitting me to make my views known

Sincerely



## EXHIBIT 2



SCHOOL OF LAW

December 5, 1984

California Law Revision Commission  
4000 Middlefield Rd. #D-2  
Palo Alto, CA 94303

Dear Sir or Madam:

This letter relates to your projects on severance of joint tenancy number H-601 and abandoned easements number H-406.

I approve entirely of the project on joint tenancy, and have no suggestions for its improvement.

As to the proposal on abandoned easements, I agree with your commentary down to footnote 10, but I do not believe that the drafted statute effectuates that commentary. Your commentary says that the commission recommends that "an easement be deemed abandoned if it has been unused for at least 20 years continuously....". The statute, on the other hand, does not refer to 20 years of disuse. It refers to the most recent 20 years of disuse before a quiet title action is filed. Thus, an easement can be unused for 100 years; an inquiry from the servient owner to the dominant owner might cause him to begin using it and there is no remedy. I think a statute more like adverse possession, which would provide for the loss of the easement after 20 years of non-user unless a preservation notice were filed would be more effective.

Further, the ability of the dominant owner to buy off the easement for costs of suit will result in few quiet title actions being brought to extinguish these easements.

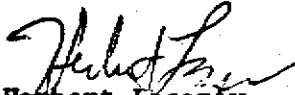
I am troubled by the proposal in §887.050(b), because the result will be that a utility will record a reservation of easement in each county in which it does business without really evaluating whether it has any desire to continue to use the easement. I do not have any other suggestions, as I do not know the extent to which utility companies accumulate unused easements. If there are a small number of these, it does not seem unreasonable to ask the company to record a specific preservation every 20 years.

The proposal does nothing in the case where it is difficult to ascertain the holder of the dominant estate. Since no action can be brought, the easement cannot be foreclosed. An adverse possession-type statute would cure that.

Finally, I question whether it is as easy and inexpensive to negotiate an agreement for a public entity to give up an easement no longer necessary as you assert in the last sentence of the commentary. Most city officials are inclined to not assent.

Thank you for the opportunity to present comments on the draft.

Sincerely,

  
Herbert Lazerow  
Professor of Law

HIL:gec



Harlan K. Veal

Judge

In Chambers

Hall of Justice

Redwood City, California 94063

December 5, 1985

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303

Re: Recommendations for Proposed Legislation:

- (1) Relating to Abandoned Easements;
- (2) Relating to Support if Support Obligor Dies

Gentlemen:

Regarding your above recommendations, I would suggest that you might want to consider the following:


1. I would suggest that Section 887.050 "Preservation of Easement" (c) (2) should be made more definite and certain by having added at the end thereof the words "and before judgment is entered therein." Clearly, this is what is intended when that subsection is read in conjunction with proposed Section 887.060. I believe the inclusion of the suggested language would make the intent more definite and certain, however.
2. I believe there is a possibility that C.C. Section 4801.4 as enacted in 1984 is unconstitutional and with your proposed amendment would become even more so. I fail to see how the court can order a spouse to do something more to guarantee support of another spouse than the supporting spouse would be otherwise obligated to do if the spouses were still happily married. Thus, if a couple are married and one spouse dies without having made any voluntary provision for life insurance, annuity, trust fund, etc., and if the deceased spouse left no meaningful estate, there is nothing which the widow or widower can thereafter do about forcing support. The 1984 amendment to C.C. 4801.4, together with your proposed new amendment imply that society has the right to require of happily married spouses, (together with the right to intervene in that marriage to see that such is accomplished) that there be an estate out of which the surviving spouse can be supported or that security for such be created immediately upon a marriage occurring. As much as I appreciate the concern of supported former spouses to see to



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it that the support will survive the death of the supporting spouse, I believe both the 1984 amendment and your proposed new amendment constitute "Big Brother" personified. The purported discretion given the trial court, I suggest is unrealistic; it is hard to conceive of a situation wherein the supported spouse could not make a very able "just and reasonable" argument.

Yours very truly,

  
Harlan K. Veal

HKV:df

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December 7, 1984

California Law Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, California 94303

RE: Tentative Recommendation Relating to  
Abandoned Easements

Gentlemen:

I have the following comments concerning the proposal to add Chapter 7 to Title 5 of Part 2 of Division 2 of the California Civil Code.

First, there are two problems with the definition of "Easement" contained in proposed Section 887.010. Because of the breadth of this definition, an easement will include both exclusive and non-exclusive easements set forth in the declaration of covenants, conditions and restrictions creating a condominium. Also, the proposed definition of easement will include easements created pursuant to reciprocal easement agreements. In both of these instances, I believe that the documents creating the easements should control the expiration date of the easements. Condominium easements and reciprocal easements are designed for the mutual benefit of multiple parties. It would be unreasonable and mechanically complex if, as a

December 7, 1984

2.

result of the failure of one party to preserve its interest in the easement, the easement could terminate as to that particular party. Accordingly, such easements should be specifically excluded from the provisions of this Chapter.

Second, Section 887.020 should be amended, in full, as follows:

"This chapter supplements and does not limit or otherwise affect the common law governing abandonment of an easement or any procedure provided by statute or otherwise for clearing an abandoned easement from title to real property."

Third, Section 887.040(c) should be revised to resolve the following problem. As proposed, this provision may cause grantees of interests in real property to insist that the conveyance of the interest include an express grant of all easements benefitting the subject property. If this practice results from the adoption of this provision, conveyancing documents and sale transactions in general may become unreasonably cumbersome.

Overall, I feel that the legislation is

beneficial. However, the above-described issues should be addressed.

Very truly yours,

  
Scott C. Verges

SCV:rr

*Southern California Edison Company*



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SENIOR COUNSEL

LAW DEPARTMENT

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December 14, 1984

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road  
Suite D-2  
Palo Alto, CA 94303

Re: Tentative Recommendation Relating  
To Abandoned Easements

On behalf of Southern California Edison Company I would like to offer the following comments to the Commission's tentative recommendation.

First, I would like to point out that Edison is supportive of the Commission's desire to facilitate clearing abandoned easements from record title. We are well aware of the difficulties that can arise when trying to acquire or dispose of property which has the cloud of an easement or other record right which does not appear likely to be exercised. However, we would suggest that the Commission's proposal provide for an exception as to easements held by public utilities.

A significant part of the Commission's motivation in making the subject recommendation appears to be the fact that very often it is difficult or impossible to locate the holder of the easement which represents a cloud on title. At page 2 of the Commission's summary, it is stated that "This scheme for clearing abandoned easements from record title would not apply to public entity easement holders. A public entity can always be located. An agreement with the public entity may be negotiated if the easement is no longer necessary for public use". It would seem that this statement would be equally true of a utility such as Edison which, like a public entity, can always be located. With respect to the statement that an agreement may be negotiated with a public entity, as a matter of practice, when Edison determines that a particular easement is no longer needed and will not be needed in the future, such easements are generally quitclaimed to the fee owners of record.

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In summary, it would appear that there is as much justification for an exemption for public utilities as there is for public agencies.

Thank you for the opportunity to provide these comments.

Very truly yours,

A handwritten signature in cursive script that reads "Philip Walsh".

PHILIP WALSH

PW:ia

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

ABANDONED EASEMENTS

November 1984

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN DECEMBER 15, 1984.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303

## TENTATIVE RECOMMENDATION

relating to

## ABANDONED EASEMENTS

Almost all improved land and much unimproved land is either benefited or burdened by easements.<sup>1</sup> Easements tend to make the land and the improvements thereon more usable or beneficial. Thus the mere existence of the burden of an easement may not indicate that the title is unmarketable; it may only mean that when these interests become obsolete, they constitute an unreasonable encumbrance.<sup>2</sup>

If an easement acquired by prescription becomes obsolete, it can be extinguished through nonuse.<sup>3</sup> If an easement acquired by grant becomes obsolete, nonuse alone is not sufficient to extinguish the easement;<sup>4</sup> the intent to abandon the easement must also be shown.<sup>5</sup>

Clearing record title of an easement created by grant that is obsolete thus requires a judicial proceeding and a difficult proof question--intent to abandon. The fact that an easement has not been used for a long period of time is not itself sufficient to infer an abandonment.<sup>6</sup> Similarly, the mere fact that the holder of an easement fails to maintain and repair it, or selects an alternative route, is insufficient to infer an abandonment.<sup>7</sup>

1. 1 A. Bowman, Ogden's Revised California Real Property Law § 13.1 (1974).
2. L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 223 (1960).
3. Civil Code § 811(4).
4. See discussion in 3 B. Witkin, Summary of California Law Real Property § 374, at \_\_\_\_ (8th ed. 1973); 1 A. Bowman, Ogden's Revised California Real Property Law § 13.50 (1974); 2 H. Miller & M. Starr, Current Law of California Real Estate § 18:64 (rev. 1977).
5. See discussion in 3 B. Witkin, Summary of California Law Real Property § 376, at \_\_\_\_ (8th ed. 1973); 1 A. Bowman, Ogden's Revised California Real Property Law § 13.49 (1974); 3 H. Miller & M. Starr, Current Law of California Real Estate § 18:66 (rev. 1977).
6. See, e.g., Vallejo v. Scally, 192 Cal. 175, 219 P. 63 (1923).
7. See discussion in 3 H. Miller & M. Starr, Current Law of California Real Estate § 18:64 (rev. 1977).



The difficulty of clearing the record of an abandoned easement impairs the value and marketability of property even though the easement is obsolete. As a general rule, if an easement is relatively old and has been unused for a period of time, the easement should be subject to extinguishment without a showing of actual intent to abandon.<sup>8</sup>

The Law Revision Commission recommends that an easement be deemed abandoned if it has been unused for at least 20 years continuously, without payment of taxes or any other record transaction relating to the easement.<sup>9</sup> To accommodate cases where the easement holder's nonuse is merely temporary or where the easement is held for future use, the Commission further recommends that the easement holder be permitted to extend the duration of the easement for a period of 20 years at a time by recording a notice of intent to preserve the easement.<sup>10</sup> In the case of large easement holders, such as public utilities, where the burden of recording as to multiple easements could be substantial, a ~~single~~ recording should suffice for all easements in a county. This will provide a relatively simple but effective means of ensuring preservation of the easement through periods of nonuse.

This scheme for clearing abandoned easements from record title would not apply to public entity easement holders. A public entity can always be located. An agreement with the public entity may be negotiated if the easement is no longer necessary for public use.

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The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Chapter 7 (commencing with Section 887.010) to Title 5 of Part 2 of Division 2 of the Civil Code, relating to easements.

The people of the State of California do enact as follows:

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8. Negative easements, such as for light and air, are excepted from this rule since the fact of nonuse is difficult to ascertain.
  9. This rule should not apply to "conservation easements" that are perpetual in duration pursuant to Civil Code Section 815.2.
  10. Recordation of a notice of intent to preserve for 20 years would not affect the ability of the servient tenement owner to show an actual abandonment should it occur before expiration of the 20-year period.

SECTION 1. Chapter 7 (commencing with Section 887.010) is added to Title 5 of Part 2 of Division 2 of the Civil Code, to read:

Chapter 7. Abandoned Easements

§ 887.010. "Easement" defined

887.010. As used in this chapter, "easement" means a burden or servitude upon land, whether or not attached to other land as an incident or appurtenance, that allows the holder of the burden or servitude to do acts upon the land.

Comment. Section 887.010 provides a special definition of an easement for the purposes of this chapter. This chapter applies to affirmative easements, whether appurtenant or in gross. Contrast Sections 801 and 803 ("easement" is an appurtenant servitude). Negative easements are not governed by this chapter.

0171

§ 887.020. Common law of abandonment not affected

887.020. This chapter supplements and does not limit or otherwise affect the common law governing abandonment of an easement or any other procedure provided by statute for clearing an abandoned easement from title to real property.

Comment. Section 887.020 makes clear that although this chapter prescribes a standard for determining that an easement has been abandoned, it is not intended to limit the common law of abandonment of easements. See discussion in 3 B. Witkin, Summary of California Law Real Property §§ 374-376 (1973); 1 A. Bowman, Ogden's Revised California Property Law §§ 13.49-13.50 (1974); 3 H. Miller & M. Starr, Current Law of California Real Estate §§ 18:64-18:66 (rev. 1977).

045/068

§ 887.030. Action authorized

887.030. (a) The owner of real property subject to an easement may bring an action to establish the abandonment of the easement and to clear record title of the easement.

(b) The action shall be brought in the superior court of the county in which the real property subject to the easement is located.

(c) The action shall be brought in the same manner and shall be subject to the same procedure as an action to quiet title pursuant to Chapter 4 (commencing with Section 760.010) of Title 10 of Part 2 of the Code of Civil Procedure, to the extent applicable.

Comment. Subdivision (a) of Section 887.030 authorizes an action to establish abandonment of an easement, subject to the limitations and conditions in this chapter. This is consistent with public policy to enable and encourage full use and development of real property. Section 880.020 (declaration of policy and purposes). This is also consistent with the common law rule that easements are subject to abandonment. See Section 887.020 and Comment thereto (common law of abandonment not affected). This chapter supplements common law principles of abandonment by providing a separate and independent basis for determining abandonment of an easement.

Subdivisions (b) and (c) incorporate, insofar as applicable, the general quiet title procedures for an action pursuant to this chapter. See Code Civ. Proc. §§ 760.010-764.070.

045/097

§ 887.040. Abandonment

887.040. (a) For the purpose of this chapter, an easement is abandoned if all of the following conditions are satisfied for a period of 20 years immediately preceding commencement of the action to establish the abandonment of the easement:

- (1) The easement is not used at any time.
- (2) No separate property tax assessment is made of the easement or, if made, no taxes are paid on the assessment.
- (3) No instrument creating, reserving, transferring, or otherwise evidencing the easement is recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument creating, reserving, transferring, or otherwise evidencing the easement or in another recorded document unless the instrument or other document provides an earlier expiration date.

(c) For purposes of this section, an instrument does not create, reserve, transfer, or otherwise evidence an easement unless the instrument makes specific reference to the easement.

Comment. Section 887.040 provides for expiration of an unused easement after 20 years, notwithstanding a longer or an indefinite period provided in the instrument creating the easement. This reverses prior law that an easement obtained by grant cannot be lost by mere nonuse. See, e.g., discussion in 3 B. Witkin, Summary of California Law Real Property § 376 (1973); 1 A. Bowman, Ogden's Revised California Property Law § 13.49 (1974); 3 H. Miller & M. Starr, Current Law of California Real Estate § 18:66 (rev. 1977).

The expiration period can be extended for up to 20 years at a time by recordation of a notice of intent to preserve the easement before the easement expires. See Section 887.050 (preservation of easement). Recordation of a notice of intent to preserve the easement does not necessarily preclude abandonment of the easement pursuant to general

principles governing abandonment for nonuse upon a showing of intent to abandon. See Section 880.310 (notice of intent to preserve interest); see also discussion in 3 B. Witkin, Summary of California Law Real Property § 374, at \_\_\_\_ (8th ed. 1973); 1 A. Bowman, Ogden's revised California Property Law § 13.50 (1974); and 3 H. Miller & M. Starr, Current Law of California Real Estate § 18:64 (rev. 1977).

Subdivision (c) makes clear that in the case of an appurtenant easement, a transfer of the dominant tenement without reference to the easement does not start the twenty-year period running anew, even though such a transfer may be effective to convey the easement. Sections 1084, 1104.

Easements held by public entities and conservation easements are not subject to expiration pursuant to this section. See Section 880.240 (interests excepted from title); Section 887.070 (abandoned easement deemed to have expired).

07440

§ 887.050. Preservation of easement

887.050. (a) The owner of an easement may at any time record a notice of intent to preserve the easement.

(b) In lieu of the statement of the character of the interest claimed and the record location of the documents creating or evidencing the easement claimed as otherwise required by paragraph (2) of subdivision (b) of Section 880.330 and in lieu of the legal description of the real property in which the interest is claimed as otherwise required by paragraph (3) of subdivision (b) of Section 880.330 and notwithstanding the provisions of Section 880.340 or any other provision in this title, a notice of intent to preserve an easement may refer generally and without specificity to any or all easements claimed by claimant in any real property situated in the county.

(c) An easement is not abandoned for the purpose of this chapter if either of the following occurs:

(1) A notice of intent to preserve the easement is recorded within 20 years immediately preceding commencement of the action to establish the abandonment of the easement.

(2) A notice of intent to preserve the easement is recorded pursuant to Section 887.060 after commencement of the action to establish the abandonment of the easement.

Comment. Section 883.230 makes recording a notice of intent to preserve an easement conclusive evidence of non-abandonment for purposes of this chapter. Recording a notice of intent to preserve also creates a presumption affecting the burden of proof that the claimant has not

abandoned the easement for purposes of a determination of abandonment pursuant to common law. Section 880.310 (notice of intent to preserve interest).

07447

§ 887.060. Late recordation

887.060. In an action to establish the abandonment of an easement pursuant to this chapter, the court shall permit the owner of the easement to record a late notice of intent to preserve the easement as a condition of dismissal of the action, upon payment into court for the benefit of the owner of the real property the litigation expenses attributable to the easement or portion thereof as to which the notice is recorded. As used in this section, the term "litigation expenses" means recoverable costs and expenses reasonably and necessarily incurred in preparation for the action, including a reasonable attorney's fee.

Comment. Section 883.250 enables the owner of an easement to preserve the easement, after commencement of an action to establish its abandonment and clear title, by filing a late notice of intent to preserve the interest. This authority is conditioned upon payment of the property owner's litigation expenses. Litigation expenses include disbursements made for title reports and other disbursements made in preparation for the litigation as well as court costs and attorneys fees incurred in connection with the litigation.

08150

§ 887.070. Effect of establishing abandonment

887.070. An abandoned easement is unenforceable and is deemed to have expired. A court order establishing abandonment of an easement pursuant to this chapter is equivalent for all purposes to a conveyance of the easement to the owner of the real property.

Comment. Section 887.070 makes clear that establishment of abandonment of an easement has the effect of a reconveyance to the owner of the land. See also Section 887.030 (action authorized) and Code Civ. Proc. §§ 764.010-764.070 (effect of quiet title judgment).

08151

§ 887.080. Transitional provision

887.080. Subject to Section 880.370 (grace period for recording notice), this chapter applies to all easements, whether executed or recorded before, on, or after January 1, 1986.

Comment. Section 887.080 makes clear the legislative intent to apply this chapter to easements existing on the date this chapter becomes operative (January 1, 1986). Section 880.370 provides a five-year grace period for recording a notice of intent to preserve an easement that would be subject to termination pursuant to this chapter before, on, or within five years after the operative date of this chapter. See Sections 887.050 (preservation of easement) and 880.370 (grace period for recording notice) and Comments thereto.