

Leg. Prog.

December 5, 1997

Memorandum 97-78**1998 Legislative Program**

This memorandum reviews the status of studies to be included, or likely to be included, in the Commission's 1998 legislative program.

Trial Court Unification

A substantial amount of staff time will be consumed by the trial court unification legislation during the 1998 session. The Commission has not yet finalized its recommendations on statute revisions, but legislation will have to be introduced immediately if anything is to be enacted by the time of the June 2 vote of the electors on SCA 4.

The legislation will need to be amended as it moves along to incorporate the Commission's final recommendations.

We expect that Senator Lockyer will either author this legislation or suggest an appropriate author.

Judicial Review of Agency Action

Senator Kopp introduced this recommendation in 1997 as SB 209 and 261. The Senate Judiciary Committee has conducted an interim study of the recommendation. See Memorandum 97-80, scheduled for consideration at the Commission's December meeting. The Committee rehearing of the bills is scheduled for January 13.

Business Judgment Rule

The Commission has approved a recommendation to codify the business judgment rule, subject to possible revision before printing and introduction. See Memorandum 97-72, scheduled for consideration at the Commission's December meeting.

We have suggestions from Assemblyman Ackerman and Senator Kopp as to possible authors for this legislation. We will take steps to place the bill after the Commission has considered the revisions suggested at the December meeting.

Real Property Covenants

The recommendation to terminate certain private land use restrictions 60 years after their last recordation is in AB 707, introduced by Assemblyman Ackerman in 1997. The measure was held in Assembly Judiciary Committee due to opposition from the Planning and Conservation League. The measure will be reheard in January.

We had hoped in the interim to work with the Planning and Conservation League to address their specific concerns. However, it now appears they have no specific concerns, but rather a generalized fear of possible unintended consequences. See Exhibit pp. 1-2. The staff takes this as a basic philosophical position opposed to facilitating marketability and development of property for its highest and best use.

The vote last year in Assembly Judiciary Committee followed party lines, and there is no reason to believe there would be any change this year. One part of the bill, clarifying the applicable statute of limitations for enforcing a violation of a land use restriction, appears to command general assent and would likely be enactable as an independent measure.

Best Evidence Rule

The recommendation to repeal the best evidence rule is embodied in SB 177, introduced in 1997 by Senator Kopp. The bill has been approved by the Senate Criminal Procedure Committee and is now pending in the Senate Judiciary Committee. It is scheduled for hearing on January 20.

We deferred a hearing on the bill in Senate Judiciary Committee until 1998 because serious reservations were being expressed by litigants in criminal cases. We felt it would be better to work with them in the hope of getting them comfortable with the bill than to precipitate their active opposition.

We have been unable to manage any shifts in positions in the interim, and substantial opposition from criminal litigants is likely. The Commission has previously considered the possibility of limiting the recommendation to civil cases only, but rejected that possibility on the grounds that the rules of evidence governing civil and criminal litigation should be the same. **Does the Commission wish to maintain this position if the bill cannot be enacted with application to criminal litigation?** Given the current composition of the committee, it is likely that a revision of this nature that is actively opposed by criminal litigants will fail

in committee. One argument in favor of limiting the bill to civil cases is that experience can be obtained under it before extension to criminal cases.

Administrative Law Judge Code of Ethics

Senator Calderon introduced this recommendation in 1997 as SB 653. After an uneventful trip through the Legislature it was removed from SB 653 (which became a vehicle for judicial review of PUC decisions) and inserted into SB 453 (Solis), which also has been through the legislative process and is pending concurrence on the Senate floor. However, SB 453 has other problems, and the fate of the measure is uncertain. Senator Calderon's office is following the situation, and is confident that the administrative law judge code of ethics proposal will be enacted ultimately.

Inheritance Involving Stepparent or Foster Parent

The Commission has approved a clarification of the law governing inheritance from or through a stepparent or foster parent. The staff does not think this measure is sufficiently significant to warrant a bill of its own, but will look for other probate legislation to attach it to.

Confidentiality of Settlement Negotiations

The Commission has not yet approved a final recommendation on confidentiality of settlement negotiations. See Memorandum 97-74, scheduled for consideration at the Commission's December meeting. It is possible, but far from certain, that work on this matter could be completed in time for introduction in 1998. We will know better after the December meeting.

Response to Demand for Production of Documents in Discovery

The Commission has circulated its tentative recommendation to change the time for responding to a demand for production of documents in discovery from 20 days to 30. Comments are due January 31. It is possible the Commission could approve a recommendation on this at its February meeting. In that case, we would look for an appropriate vehicle to attach it to.

Annual Resolution of CLRC Authority

Each year the Legislature adopts a concurrent resolution setting the Commission's agenda. The resolution ordinarily continues the Commission's authority to study previously authorized topics.

During the past year Assemblyman Ackerman looked into the possibility of authorizing the Commission to study the topic of judicial administration. This concept came up in connection with the trial court unification project. The chair of the Assembly Judiciary Committee was cool to the concept, probably in part due to its nebulous character. **We may wish to request authority to study specific issues in judicial administration identified in our report on trial court unification.** A provision in the resolution might look something like:

Resolved, that the Legislature approves for addition to the calendar of the California Law Revision Commission the new topics listed below:

(1) Issues in judicial administration identified for future study in the Commission's report pertaining to statutory changes that may be necessitated by court unification, including jurisdictional limits for economic litigation procedures, jurisdictional limits for small claims cases, obsolete statutes relating to expired pilot projects, obsolete statutes relating to prior court and personnel restructurings, special superior court sessions, concurrent jurisdiction issues, consolidation of jury commissioner functions, appealability of orders of recusal, magistrates as judicial officers, and publication of legal notices within former judicial districts.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary



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November 29, 1997

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Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: AB 707—Automatic Expiration of Easements

Dear Nathaniel Sterling:

Thank you for your letter of October 21, 1997. I am sorry to have taken so long to get back to you. As it turns out, this legislative interim period has been a very busy one for me. I appreciate your willingness to hear further about my concerns about AB 707.

I have reviewed the May 1, 1997 version of the bill, which I believe is the latest. I also have again reviewed the Commission's earlier report. I am sorry to tell you that I continue to be opposed to AB 707—largely because I think that it is extremely likely that the bill would result in a number of "unforeseen consequences," some of which would have adverse impacts on the environment and land use.

While the exceptions outlined in Section 888.020 are well intentioned, I don't believe it is possible to anticipate every restriction that will be eliminated. It would be necessary to know how every restriction is worded and constructed, and by whom it was imposed, and why, to understand the actual impact of the bill. This is knowledge that no one has—including the Commission. Therefore, I basically think it is imprudent automatically to wipe out land use restrictions when it is not known what is actually going to be eliminated.

For instance, the bill may affect the ability of non-governmental agencies to implement easements and other land use restrictions that have a public benefit. The bill may also undo parcel consolidations or nullify other land use restrictions made in connection with land use approvals by local governments. There is absolutely NO guarantee that past land use restrictions that have been made "in fulfillment of a requirement of a public entity..." will "appear on the record." [See Section 888.010 (c), Page 2, lines 25-26]. While it certainly would be "good practice" for such restrictions to indicate, as part of the record, that the restrictions have been imposed in fulfillment of a requirement of a public entity, we could never know how many such restrictions made in the last 60 years do not, in fact, show that fact "on the record."

926 J Street, Room 612, Sacramento, CA 95814 916-444-8726 FAX 916-448-1789

E-mail address: pclmail@pcl.org Website address: <http://www.pcl.org/pcl>

In short, I do not think that the legislation is a good idea. If the Commission wants to deal with the statute of limitations issue, that would be fine—Section 4 of the bill, in other words, would be fine on its own. If the Commission is concerned about racial covenants, then a bill dealing with such covenants—and immediately eliminating them—would also be fine, and I would have no objection.

However, I do not believe that it is good policy to eliminate all non-excepted restrictions on a wholesale basis, because it is not clear what these restrictions are. I don't think that there is a way around this problem. Certainly eliminating the phrase "provided that fact appears on the record" from Section 888.010 (c) would be an improvement in the bill, but I think there is a logical difficulty. Unless we know what we're doing when we eliminate existing land use restrictions, I think that it is unwise to eliminate them. In the case of AB 707, we don't actually KNOW what its effect would be, and therefore I think it would be bad policy to pass this bill.

Again, thank you for taking my views into consideration.

Very truly yours,



Gary A. Patton, General Counsel
Planning and Conservation League

cc: ✓ Assembly Member Ackerman
Al Hernandez, Assembly Judiciary Committee
Madelyn Glickfeld