Section XV

ITEM ANALYSIS

Introduction

This section is an analysis of the RE 624 and 628, Part III, Notices of Intention. Its purpose is to clarify what DRE requires and why; it cannot, however, deal with every contingency. The analysis deals with an average instance and the basic considerations of file review.

How to Use the Item Analysis

The Item Analysis is organized to correspond with the Notice of Intention (RE 624 and 628); that is, item number by item number.

Analysis Format

Question # _____

The number relates to the Part III Notice of Intention number for the document (also the tab number).

DOCUMENT TITLE

"*Required under what circumstances" explanation.*

- **Definition:**
- **Reference:**

  The relevant law sections are shown here.

  "Real Estate Law" refers to Business and Professions Code Sections. "Comm. Regulation" refers to Commissioner's Regulations (California Code of Regulations).

- **Why required:**

  This is an explanation in layman's terms of why the document is required.

- **Elements for review:**

  The elements listed are only the minimum features that the Deputy checks. The list is meant to alert the applicant to the fundamental elements that must be considered when submitting the document.

- **Items for disclosure:**

  This lists the typical facts that, if found in the document, would be included in the public report. This list is not, however, exhaustive, or otherwise limiting on what the Deputy may disclose.

- **Item is unacceptable if:**

  This is a list of typical conditions which would clearly make the document unacceptable and require submittal of a new or modified document. This list is not exhaustive. It is presented so that the applicant may pre-review documents before submittal. By eliminating any of these fundamental problems before submittal of the document, the applicant can prepare more correct filings and thus save time.

☞ See Section V, item E, for explanation of use of items/documents designated [Master File Item].

Questions 1A — 1L

APPLICATION GENERAL INFORMATION

- **Reference:**

  Real Estate Law: 11010, 11010.2 and 11011

- **Why required:**

  This information is required for various administrative purposes:

  - Fees handling
  - File control/processing time frames
  - Deputy assignment
  - Communications.

- **Items for disclosure:**

  Basic information is used in the public report.

Question 1M

OVERALL PROJECT PLAN

- **Reference:**

  Real Estate Law: 11018 and 11018.5(e)

- **Why required:**

  This establishes the intention of the applicant and impacts the CC&Rs, the map, access, the budget, financial arrangements, etc., as applicable.

- **Items for disclosure:**

  This information is disclosed in the preliminary, conditional and final public reports.

Question N(1), (2), (3) and (4)

IMPROVEMENTS INFORMATION

- **Reference:**

  NA

- **Why required:**

  This gives an overview of the project that is useful in the rest of the file review. It pertains to budget analysis, and financial arrangements.

- **Items for disclosure:**

  This is usually disclosed in the preliminary, conditional and final public reports so that prospective purchasers get an overview. Parking information can be an important suitability factor to buyers.

Question 1"O"

HUD - OCRA QUESTION

- **Reference:**

  NA

- **Why required:**

  This alerts DRE to forward the final public report to HUD-OCRA if the filing falls under HUD-OCRA jurisdiction.

- **Items for disclosure:**

  A project that will be registered with HUD-OCRA will include in the public report the following special note:

  Special Note

  IF YOU RECEIVED THE PUBLIC REPORT PRIOR TO SIGNING A CONTRACT OR AGREEMENT, YOU MAY CANCEL YOUR CONTRACT OR AGREEMENT BY GIVING NOTICE TO THE SELLER ANY TIME BEFORE MIDNIGHT OF THE SEVENTH DAY FOLLOWING THE SIGNING OF THE CONTRACT OR AGREEMENT.

  IF YOU DID NOT RECEIVE THE PUBLIC REPORT BEFORE YOU SIGNED A CONTRACT OR AGREEMENT YOU MAY CANCEL THE CONTRACT OR AGREEMENT ANY TIME WITHIN TWO (2) YEARS FROM THE DATE OF SIGNING.

  ☞ The above note should be set forth at the top of page 2 of standard subdivision public reports, and at the top of page 3 of common interest subdivision public reports.

  The above language should be used in describing the federal rescission rights in the public report and on the face or signature page above all signatures in all forms of contract or agreements and promissory notes to be used in the selling or leasing of lots:

  The rescission provisions may not be limited or qualified in the contract or other document by requiring a specific type of notice or by requiring that notice by given at a specified place.

  Public report issuance
  Along with all issued HUD public reports, DRE will provide the subdivider with a blank HUD Interstate Land Sales Fact Sheet (RE 614D) and letter (RE 614C) advising of the requirement to file with HUD. A copy of RE 614C is sent to the subdivider by DRE. Subdivider is responsible to forward the public report along with the letter and appropriate fee to HUD/OCRA.

  Pursuant to California's certification agreement, a California subdivision may satisfy the registration requirements of the Interstate Land Sales Full Disclosure Act by filing a copy of the California final public report, letter (RE 614C), a completed RE 614D and the appropriate fee in lieu of the federal Statement of Record. A California subdivision will be considered registered with HUD upon OCRA's receipt of the items specified.

  DRE only enforces and interprets specific code section of law as outlined in Section 10050 of the Business and Professions Code and can not attempt to explain or interpret the federal law. Refer to HUD if any questions.

***Question 2A/B** [Master File Item]*

RE 608s * AND/OR CERTIFICATE OF QUALIFICATION BY CALIFORNIA SECRETARY OF STATE

Required if the subdivider is not a resident of California.

■ **Definition:**

RE 608s * are for substituted service of process. The Certificate of Qualification is an official document verifying that a corporation or limited liability company organized under the laws of another state is qualified to do business in California. It is issued by the Secretary of State.

■ **Reference:**

Real Estate Law: 11007

Comm. Regulation: 2792

■ **Why required:**

RE 608s* — If the applicant is a non-California resident the form is his/her/its agreement to allow legal action to be taken (make service of process) against him/her/it, if necessary.

Certificate of Qualification — Non-resident ***corporations*** and ***limited liability companies*** must submit a Certificate of Qualification in addition to RE 608.

■ **Elements for review:**

- Document must be current
- Certificate of Qualification must bear Secretary of State's seal
- RE 608s*, if executed out of state, must be notarized.

* Consents to Service of Process
RE 608 = Individual, Partnership, Corporation, Limited Liability Company
RE 608B = Out-of-State Trustee

■ **Items for disclosure:**

If an out-of-state entity, the public report would include that fact.

Question 3

LOCATION OF SALES RECORDS

■ **Reference:**

Comm. Regulation: 2795.1

■ **Why required:**

This is needed to facilitate possible auditing of records. Unacceptable if custodian's name not shown. P.O. Box is unacceptable.

Question 4A/B

CONDITIONAL PUBLIC REPORTS

Refer to Section V, item D for information regarding conditional public reports. Authorizes the subdivider to enter into binding contracts prior to issuance of the final public report.

■ **Reference:**

Real Estate Law: 11018.12

Comm. Regulation: 2790.2

PRELIMINARY PUBLIC REPORTS

Authorizes the subdivider to advertise the subdivision and take non-binding reservations prior to issuance of the final/conditional public report.

- **Reference:**

  Real Estate Law: 11018.2
  Comm. Regulation: 2792 and 2795

RE 612

Required if a preliminary report is requested.

- **Definition:**

  The DRE-approved Reservation Instrument, completed in sample form.

- **Why required:**

  The regulations require that the reservation instrument contain certain provisions and be on a form previously approved by DRE. The 612 reservation agreement is a way to make sure the applicant is aware of the proper conditions, i.e., use of a neutral escrow depository and return of buyer's funds upon request.

- **Elements for review:**

  - Name and address of depository.

- **Items for disclosure:**

  - Name and address of depository.

- **Item is unacceptable if:**

  - It is on a different form with terms not approved by DRE
  - It is not verified to be a sample of the document to be used
  - Depository is not listed by street address.
  - If depository is other than an escrow company licensed by the California Department of Corporations or title company licensed by the California Department of Insurance, state or federally chartered bank or savings and loan.

RE 612A

Required if a preliminary public report is requested.

- **Definition:**

  The Reservation Deposit Handling Agreement, completed in sample form.

- **Why required:**

  This document confirms that the applicant agrees, and has made arrangements, to place all reservation monies in an escrow and that the escrow depository understands that these deposits are fully refundable to the potential buyers, upon buyer's request.

- **Elements for review:**

  - Name and address of depository
  - Executed by subdivider and escrow depository.

- **Items for disclosure:**

  - Name and address of depository.

- **Item is unacceptable if:**

  - It is on a different form with terms not approved by the DRE

- Not signed by applicant and depository (original not photocopied signatures)
- Depository is not listed by street address.
- Depository is not an acceptable escrow.

Question 5 *[Master File Item]*

ADVERTISING AND PROMOTION

Required when certain types of inducements or representations of the project are offered as part of the sales program.

☞ REFER TO SECTION XIII GUIDELINES FOR GIFT PROGRAMS AND CREATIVE FINANCING PLANS

■ **Definition:**

Descriptive information, advertising copies, exemplars, and details of financial arrangements to carry out the programs.

■ **Reference:**

Real Estate Law: 10140 and 11022

Comm. Regulation: 2792 and 2799.1

■ **Why required:**

Inducements and representations of the types listed in this question are all substantive. If there is nothing to back up these claims, it could be misrepresentation. Preventing this is the Department's purpose, so details of these inducements must be submitted.

■ **Elements for review:**

- No improvements may be advertised unless they are completed and available for use or unless financial arrangements have been made for their completion.
- If investment merit is advertised, it must be supported by statistical research, economic feasibility reports, appraisals, etc.
- Formalized proof of availability must be presented for all off-site recreational facilities
- Sufficient numbers of gifts must be on-hand or available without delay
- Financial arrangements must be sufficient.

■ **Items for disclosure:**

- The true nature of program or amenity offered and the duration of its availability
- Details of financial arrangements to insure completion or availability.

■ **Item is unacceptable if:**

- Information is not consistent
- Financial arrangements are inadequate
- Advertised merits are not supported.

Question 5A(1) — (8)

ADVERTISING AND PROMOTION

Question 5A(1)

If the answer to this question is yes, the details submitted should include facts and statistics in the form of an economic feasibility report or similar research, appraisal report and samples of proposed investment representations, in support of the proposed representations.

Q Items 5(3) – (6)

If the answer to any of these questions is yes, submit all details along with documents that will be used. Include RE 609, Instructions to Escrow (Promotional Gifts), if item 5A(3) is answered yes.

Submit evidence that reasonable arrangements have been made to assure completion of any private facilities for which it will be represented that purchasers will receive use rights coupled with the purchase of a lot, unit or interest [Section 11018.5(a)(1)], as well as evidence that the use arrangements for those private facilities are sufficient to insure buyer's rights. [Regulations 2799.1(4) and (5)]

Q Item 5A(7)

If the answer to this question is yes, the details submitted should include all local governmental requirements for land divisions and lot splits and an estimate of the costs that an owner would incur to comply with these requirements.

Q Item 5A(8)

If the answer to this question is yes, submit RE 624E and any supporting documents appropriate to that form.

Question 6A

PRELIMINARY REPORT

Required document

- **Definition:**

  A statement by a title insurance company that reflects all items currently of record or which encumber the property as of the date shown. Typically, the following items will be shown:

  - Taxes
  - Assessments
  - Transfer Fees
  - Easements
  - Mineral, oil and gas reservations, if any
  - Legal description of property covered in report

- Vested owner
- Assessor's parcel number
- Plot map of property covered in report
- CC&Rs of record, if any
- Liens, if any.

■ **Reference:**

Real Estate Law: 11010(b)(4), 11018(c)

Comm. Regulation: 2792 and 2792.1

Civil Code: 1098.5

■ **Why required:**

The preliminary report shows whether the applicant has the legal right to offer the subdivision interests to the public. It will also show any encumbrances upon the title that may affect the subdivider's ability to complete the project or which may affect the potential purchaser's interest.

■ **Elements of Review:**

- Legal description must agree with the map.
- Title company must be licensed to do business in California.
- The title report may not be more than 90 days old when the public report is issued.
- Title report must be signed by an authorized employee of the title company (signature facsimile acceptable).
- Applicant must have fee ownership or evidence of future vesting.
- Any assessment districts? If YES, submit information as required.
- Any transfer fees? If YES, submit copy of recorded document required by Section 1098.5 of the Civil Code.
- Any mineral, oil & gas reservations? If YES, grant deed must reflect same.
- Any setbacks mentioned? (e.g., Alquist Priolo Special Studies Zone setbacks)
- Any pending litigation? If YES, submit information on how purchasers will be protected.
- Any restrictions of record? If YES, submit copies or clarify.
- Any liens? If YES, demonstrate how purchaser will be conveyed lien-free title.
- Any agreements with local authorities? If YES, submit copies and financial arrangements, if appropriate.
- Any unusual easements? If YES, submit clarifying information.
- Items affecting marketable title.

■ **Items for disclosure:**

- Easements or relinquishments
- The entity in title will be disclosed if other than the applicant and the applicant's interest will be indicated
- Pertinent elements, e.g., easements, assessment districts, transfer fees etc.

■ **Item is unacceptable if:**

- Title is in name of entity other than the applicant and there is no evidence of future vesting
- Ability to convey lien-free or marketable title is uncertain
- The property described in the title report does not match property to be covered by the public report.
- It is not signed by an authorized employee of title company
- The title report is more than 90 days old when the public report is issued
- The title report doesn't include the following provisions:

A. No known matters otherwise appropriate to be shown have been deleted from this report, which is not a policy of title insurance but a report to facilitate the issuance of a policy of title insurance.

For purposes of policy issuance, items _____ may be eliminated on the basis of an indemnity agreement or other agreement satisfactory to the company as insurer.

1. The preliminary report is to be addressed to the developer;
2. The informational note set forth above must be included in all preliminary title reports which are going to be submitted to the Department of Real Estate to satisfy Section 11010 of the Business and Professions Code; and
3. The blanks in the informational note must be filled-in to indicate either that no items are presently intended to be deleted or to indicate the number of each item referenced in the report which is intended to be deleted.

B. A title insurance policy could serve in lieu of a preliminary report.

C. The public report will be issued in the name of the true party in interest (owner of beneficial interest) even though the title may be in the name of a trustee under an irrevocable trust agreement. Facts regarding title being held in trust, and the name of the trustee, will be disclosed in the public report, usually in the paragraph entitled: TITLE.

D. If the title evidence submitted does not show title in the applicant's name, and there is *no* evidence of future vesting forthcoming, one of the following conditions must be met:

1. Obtain a new title report or other evidence showing title vested in the applicant; or
2. Obtain a notarized statement(s), signed by all those in title who did not sign the application, which specifies that the signatories will join in the filing and be bound by the representations made therein; or
3. If title is in trust or in a holding agreement obtain a copy of the trust or holding agreement. Review the agreement to ascertain that the applicant has the beneficial interest in the subdivision.

Question 6B

EVIDENCE OF FUTURE VESTING

Required when subdivider is not presently in title. Evidence could include, for example, a purchase agreement, certified escrow instructions, recorded option agreement or memorandum of option agreement, etc.

■ **Definition:**

Self-explanatory. Option or purchase agreement must show date (a date certain) by which title is to vest: a date certain by which the option must be exercised or purchase completed.

■ **Reference:**

Real Estate Law: 11010(b)(4) and 11018(c)

■ **Why required:**

A preliminary report showing title in someone other than the applicant is unacceptable unless there is some arrangement for the applicant to take title in the future.

■ **Elements for review:**

- Agreement demonstrates a serious intent of subdivider to purchase.
- Signatures of buyer and seller or optionor and optionee
- Compliance may be established by an executed purchase agreement
- Date title is to be vested or term during which option must be exercised.

■ **Items for disclosure:**

- Date on which the subdivider's option or purchase agreement expires. The public report will have an expiration date which is 30 days after the date on which subdivider's right to acquire the property terminates.

■ **Item is unacceptable if:**

- It fails to demonstrate right to future title.
- Does not cover correct property.

Question 6C — 6E

MINERAL, OIL, GAS AND WATER RESERVATION

■ **Reference:**

Real Estate Law: 11010(b)(8) and 11018(f)

■ **Why required:**

If such reservations exist, the preliminary report usually shows them as a condition of title. The grant deed must reflect them. If they will be reserved in the future, the exemplar grant deed must provide for this reservation. If rights of surface entry are not waived, substantial losses could be incurred by purchasers, should such entry rights be exercised.

■ **Elements for review:**

- Does the preliminary report show existing reservations?
- Does the exemplar grant deed show existing and/or proposed reservations?
- Have rights of surface entry been waived?
- If surface entry rights have not been waived, will they be?
- If surface entry rights will not be waived, will a title insurance endorsement be provided to insure around losses which may be incurred?

■ **Items for disclosure:**

- Existence of reservation and potential damage
- If rights of surface entry aren't waived, insured around or otherwise resolved, the following special note will appear in the public report.

Special Note

MINERAL RIGHTS: YOU WILL NOT OWN THE MINERAL, OIL AND GAS RIGHTS UNDER YOUR LAND. THE RIGHT TO SURFACE ENTRY TO EXTRACT MINERALS HAS NOT BEEN WAIVED BY THE OWNER OF THESE RIGHTS. UNLESS OTHERWISE RESTRICTED, THE OWNER OF MINERAL, OIL AND GAS RIGHTS IS ENTITLED TO ENTER UPON YOUR LAND TO PENETRATE THE SURFACE TO EXTRACT SUBSURFACE MINERALS. BECAUSE OF THE LOCATION OF THE SUBDIVISION, LOCAL ZONING OR OTHER LAWS OR REGULATIONS MAY PROHIBIT THE OWNER FROM DOING THIS. FOR FURTHER PARTICULARS, YOU SHOULD CONTACT THE BUILDING DEPARTMENT OF THE CITY OR COUNTY IN WHICH YOUR PROPERTY IS LOCATED. IF YOU ARE PURCHASING, YOU CAN REQUEST A "HOMEOWNERS ENDORSEMENT" TO YOUR POLICY OF TITLE INSURANCE WHICH WILL INSURE AGAINST LOSS UP TO THE AMOUNT OF THE POLICY, FOR DAMAGE TO ANY OWNER-OCCUPIED RESIDENTIAL STRUCTURE THEN ON THE LAND WHICH RESULTS FROM THE EXERCISE OF SURFACE ENTRY RIGHTS.

☞ ***Although these are questions rather than document items, the preliminary report and/or the grant deed must agree with the answer provided on the Notice of Intention. The answer is unacceptable until it agrees with the documents and vice versa.***

If there is any question concerning the ability to answer YES or NO to 6E, a CLTA Guarantee Form should be requested from the title insurance company.

Preliminary reports issued by title insurance companies in Northern California do not ordinarily disclose such reservations, for example, on land homesteaded under the provisions of the Stockraising Homestead Act of 1916. A special title search to determine if such mineral reservations exist may have to be requested and paid for. Such reservations may be disclosed in preliminary reports issued in Southern California (south of Fresno).

The applicant is responsible for furnishing the correct information concerning such mineral reservations.

Question 7 *[Master File Item]*

LEASES AFFECTING TITLE

Required when leases exist which affect title.

■ **Definition:**

Contracts for possession of and profits from land or property for a certain period of time and affecting vested title to the property.

■ **Reference:**

Real Estate Law: 11010(b)(4), 11013, 11013.1 and 11013.2

Comm. Regulation: 2792 and 2792.1

■ **Why required:**

This is another document which deals with the overall status of the subdivision. The lease may affect the purchaser's use of the property or the applicant's right to offer the property. It is a type of blanket encumbrance and as such must be reviewed in order to confirm that the proposed offering is workable.

■ **Elements for review:**

- Term of lease
- Consideration (e.g., rent)
- Any costs to purchasers
- Liabilities to purchasers other than cost?
- What, if anything, happens at the end of the lease?
- If Indian tribe is lessor, must have Bureau of Indian Affairs (Department of Interior) approval
- Maintenance, improvement, assessment obligations
- Sublease and assignment powers
- Any limitations on assignment of powers to subdivider?

■ **Items for disclosures:**

- That a lease exists and details of that lease
- Any costs to the purchaser, including property taxes
- Any limitations on use

- Subdivider's obligation to supply a copy of the lease to the purchaser.

■ **Item is unacceptable if:**

- There is no assignment of powers
- No recourse exists to protect purchaser in case lessee defaults
- Lease has features not approved by Bureau of Indian Affairs (if applicable).
- The lease provisions are inconsistent with the proposed offering.

Question 8 *[Master File Item]*

COASTAL ZONE PERMIT OR EXEMPTION

Required when subdivision is located within the Coastal Zone.

■ **Definition:**

Self-explanatory

■ **Reference:**

Comm. Regulation: 2792, 2792.1

■ **Why required:**

The document verifies that the proposed subdivision is in compliance with the California Coastal Act and precludes a situation wherein, for example, a consumer purchases a vacant lot in a coastal subdivision which is not exempt or for which a Coastal Zone permit has not been issued and the purchaser later discovers that the lot is not buildable, as it does not meet Coastal Act requirements.

Each lot to be sold in a non-raw land subdivision must meet Coastal Act requirements before a Coastal Zone permit is issued for the subdivision.

■ **Elements for review:**

- Time restrictions, if any
- Limitations as to use
- Is project setup allowed under the terms of the permit
- Does permit or exemption cover the subject property.

■ **Items for disclosure:**

- Limitations on use.

■ **Items is unacceptable If:**

- It does not cover the project or property as described in the filing.
- The permit had expired.

Question 9A — 9J *[Master File Item]*

USES, ZONING, AIRPORT, HAZARDS, NUCLEAR POWER PLANT INFORMATION

■ **Reference:**

Real Estate Law: 11010(a), 11010(b)(13), and 11018(f)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

This is basic to the public report process. In order to determine suitability, the intended use of the property being offered must be known, as must be: zoning, surrounding zoning, significant surrounding uses, nearby hazards, existence of airports within two statute miles, whether or not the subdivision lies within a Nuclear Power Plant Basic Emergency Planning Zone (a ten-mile radius from the plant) or *Airport Influence Area* (aka *Airport Referral Area*), whether or not property in or near the subdivision has been used as a toxic and/or solid waste dump site, oil sumps or for military training purposes, proximity to railroad tracks, high tension wires, rock quarries, open canals, freeways, neighboring agricultural production, timber land production, etc. In addition, any environmental hazards on the subject property should be made known, such as formaldehyde, radon gas, lead-based paint fuel or chemical storage tanks, contaminated soil or water on the property and rock material which includes natural occurrences of asbestos.

■ **Items for disclosure:**

- Any hazards
  - Lead-based paint (24 CFR Part 35 and 40 CFR Part 745)
- Uses other than residential
- Unusual adjacent zoning
- Names of, and distance to, any airport within two miles
- If the subdivision is within a nuclear power plant Basic Emergency Planning Zone; name of, and distance to, nuclear power plant.
  - If the subdivision is within *Airport Influence Area* (aka *Airport Referral Area*)
  - If the property contains rock material that includes or is coverd by a State prepared map indicating the likelihood of the presense of natural occurrence of asbestos.

☞ Ordinarily the information filled-in on RE 624/628 at items 9A–J is noted in the public report. The Deputy may request submittal of information or documentation which elaborates upon the filled-in information; e.g., if the project is adjacent to a freeway and noise mitigating construction was required, or if the project is in the flight path of an airport, etc.

☞ Offerings for agricultural purposes, commercial farming/ranching purposes, etc., must include evidence of suitability, e.g., feasibility studies – soil, economics, water availability, etc.

☞ ***Nuclear Basic Emergency Planning Zone***
The three California nuclear power plants are listed below. Also listed below are the counties which have established Basic Emergency Planning Zones. You may phone, or correspond with, the county to learn if your subdivision is within a Basic Emergency Planning Zone.

****Rancho Seco***

•Amador County Office of Emergency Services
700 Court Street
Jackson, CA 95642
(209) 223-6384
•Sacramento County Office of Emergency Services
711 G Street 2nd Floor
Sacramento, CA 95814
(916) 874-4670
•San Joaquin County Office of Emergency Services
222 E. Weber Avenue, Courthouse, Rm 610
Stockton, CA 95202
(209) 468-3962

San Onofre

•San Diego County Office of Emergency Services
5555 Overland Avenue Building 19
San Diego, CA 92123
(858) 565-3490

Diablo Canyon

• San Luis Obispo County
Office of Emergency Services
County Government Center Room D - 430
San Luis Obispo, CA 93408-2790
(805) 781-5011

* Although these plants are not currently operative the following special note will still apply.

If the subdivision is located within a ten-mile radius of a nuclear power plant, the public report will include the following special note:

Special Note

THE SUBDIVISION IS LOCATED WITHIN _____ MILES OF THE _____ NUCLEAR POWER PLANT.

IT IS WITHIN THE BASIC EMERGENCY PLANNING ZONE, THE AREA SURROUNDING EACH OF CALIFORNIA'S NUCLEAR POWER PLANTS, IN WHICH BOTH STATE AND FEDERAL GOVERNMENTS REQUIRE PLANNING TO PROTECT THE PUBLIC IN THE UNLIKELY EVENT OF A SERIOUS ACCIDENT AT THE PLANT. PLANS FOR PUBLIC INFORMATION AND FOR A FULL RANGE OF PROTECTIVE ACTIONS, INCLUDING EVACUATION, HAVE BEEN DEVELOPED BY LOCAL EMERGENCY SERVICES OFFICES.

Questions 9K-9M

NATURAL HAZARDS, RIGHT TO FARM, SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSSION

■ **Reference:**

Real Estate Law: 11010(a), 11010(b)(16)(17) and 11018(f)

Comm. Regulation: 2792, 2792.1

Civil Code: 1103

■ **Why required:**

To provide disclosure of natural hazards consisting of potential flooding, fire hazards, earthquake faults, and seismic hazards and whether the property is located within the jurisdiction of San Francisco Bay Conservation and Development Commission or within one mile of a farm or ranch land designated on the current county-level GIS "Important Farmland Map".

■ **Items for Disclosures:**

- All "yes" responses to the listed questions must include the disclosures indicated.

■ **Item is unacceptable if:**

- Information requested is not provided.

***Question 10A — 10C** [Master File Item]*

FIRE PROTECTION QUESTION

- **Reference:**

  Real Estate Law: 11010(b)(8)

  Comm. Regulation: 2792, 2792.1

- **Why required:**

  Suitability of offering could depend on adequacy of fire protection service.

- **Items for Disclosures:**

  - If there is no fire protection
  - If there are no hydrants, provisions for fire protection would be disclosed
  - If fire station and equipment are located too far from subdivision to be effective.
  - If only wildfire, not residential, protection is provided.

Question 10B — 10C

FIRE LETTER

Required when subdivision is to be serviced by other than a public fire protection agency located within five miles of the subdivision. Always submit if fire protection is by volunteer entity, by U.S. Forest Service or by CAL FIRE (California Department of Forestry and Fire Protection), individually or via contract with a county.

- **Definition:**

  The letter gives the details of the fire protection service.

- **Reference:**

  Real Estate Law: 11010(b)(8), 11018(a) and 11018.5(e)

- **Why required:**

  Such details may be disclosed in order to give potential purchasers information about a vital service that may be marginally effective. The adequacy of fire protection and any costs involved may affect the suitability of the subdivision for some buyers.

  If you answer NO to question 10B, submit a letter from the fire protection agency stating the location of the nearest fire station, the distance from the subdivision, what protection will be provided and any other pertinent information e.g., fire hazards existing within the subdivision and/or surrounding area, response time, staffing (volunteer or salaried) and number of trucks, etc.

  If you answer YES to question 10C, submit a will-serve letter from fire protection agency, if any, providing structural fire protection and a will-serve letter from the appropriate Ranger Unit of CAL FIRE as to wildland fire protection. If CAL FIRE is the sole provider of fire protection, the will-serve letter requested under question 10B will suffice.

- **Elements for review:**

- Special problems of the area such as brush or that the subdivision is located in an area serviced only by U.S. Forest Service
  - Special insurance rates
  - If distances are great or response times are slow

- Limitations of service
- Whether the property lies within a State Responsibility Area.

■ **Items for disclosure:**

- Hazards or special problems
- Special costs to purchasers, e.g., required installation of water storage tank
- High insurance rates
- Lengthy response time
- State Responsibility Area owner obligations
- As applicable, the text of a fire letter may be incorporated in the public report
- Where only wild land fire protection is provided by the CAL FIRE or U.S. Forest Service, the text of the letter will be included in the public report.

■ **Item is unacceptable if:**

- Information requested is not provided.

Questions 11A — 11D

SEWER INFORMATION, EVIDENCE OF FINANCIAL ARRANGEMENTS, OR VERIFICATION OF INSTALLATION OR STATEMENT OF FINANCIAL OBLIGATION

■ **Reference:**

Real Estate Law: 11010(b)(6)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

Adequate provisions for sewage disposal are essential for residential use projects.

If public or private sewer systems are part of the offering, there must be evidence presented that financial arrangements have been made to extend sewer services to the lot or residence.

It must be shown that the sewer system has the capacity to add the lots/units/residences and provide adequate service.

If the sewer system is under Public Utilities Commission (P.U.C.) jurisdiction, a letter from P.U.C. must be submitted which states that the sewer entity is approved to service the project.

If the subdivision is not improved with residential structures, or if the purchaser will have to pay sewer extension and/or hookup fees, cost estimates must be submitted and these amounts will be disclosed in the public report.

A letter from the local health authority must be submitted which states that septic tanks or other individual systems are the acceptable method of sewage disposal for this subdivision, that each and every lot is suitable for the installation of a septic tank or other individual system and a permit would be issued if, at the date of the letter, an application for a permit were made in compliance with local permit requirements..

If the letter from the local health authority does not reference each and every lot as being suitable for the proposed sewage disposal system, the sample escrow instructions and the sample sales agreement must provide that no sale will be closed until the purchaser has received a written opinion, satisfactory to the purchaser, from the local health authority, a registered civil engineer or a geologist that the lot/parcel is suitable for the installation of a septic tank or other individual system and a permit would be issued, at the date of the opinion, if an application for a permit were made in compliance with local permit requirements on that date.

A cost estimate for the septic system must be provided and said estimate will be disclosed in the public report.

■ **Items for disclosure:**

- Any costs to purchaser
- Any unusual conditions or costs
- Responsibility for operation
- Whether subject to Public Utilities Commission regulations
- Type of service/system to be used
- Problems with percolation, installation, etc.
- Need for specially designed systems.

■ **Item is unacceptable if:**

- Service to each and every lot/unit is not demonstrated
- Sewer system proposed does not have adequate capacity
- Arrangements are inadequate or unclear
- No Public Utilities Commission clearance, if applicable.

☞ If there is no means of sewage disposal, a final public report will generally not be issued.

In some special instances, a raw land final subdivision public report may be issued. All raw land final subdivision public reports will include the following special note:

Special Note

THIS PROPERTY IS UNDEVELOPED RAW LAND AND MAY ONLY BE OFFERED AS SUCH. NO REPRESENTATIONS MAY BE MADE BY SUBDIVIDER OR AGENT THAT THE PROPERTY MAY BE USED FOR ANY PURPOSE. PROSPECTIVE PURCHASERS ARE URGED TO VISIT AND INSPECT THE PROPERTY BEFORE ENTERING INTO ANY BINDING AGREEMENT TO PURCHASE.

IN A RAW LAND SUBDIVISION OFFERING, THE SUBDIVIDER'S PROMOTIONAL AND MARKETING COSTS ARE GENERALLY GREATER THAN IN OTHER TYPES OF SUBDIVISIONS. IF YOU ARE CONTEMPLATING THE PURCHASE OF A PARCEL IN THIS SUBDIVISION WITH THE IDEA OF RESELLING IT WITH OR WITHOUT FURTHER DEVELOPMENT OF THE PARCEL, YOU SHOULD BEAR THE FOLLOWING IN MIND:

A. IT IS LIKELY TO BE VERY DIFFICULT TO RESELL THE PARCEL AT A PROFIT WITHOUT A WELL-FINANCED PROMOTIONAL CAMPAIGN OR SALES ORGANIZATION.

B. IN ANY EFFORT TO RESELL THE PARCEL, YOU ARE LIKELY TO BE IN AN UNFAVORABLE COMPETITIVE POSITION WITH THE SUBDIVIDER AND OTHER PERSONS SELLING PARCELS IN THIS SUBDIVISION AND IN OTHER SUBDIVISIONS IN THE VICINITY.

C. IT WILL PROBABLY BE DIFFICULT FOR YOU TO REACH AN AGREEMENT WITH OTHER OWNERS OF PARCELS WITH RESPECT TO FURTHER DEVELOPMENT OF THIS SUBDIVISION FOR ANY PURPOSE AND FINANCING OF FURTHER DEVELOPMENT MAY BE HARD IF NOT IMPOSSIBLE TO ARRANGE.

D. THE PROSPECT THAT A LAND DEVELOPER WILL PURCHASE YOUR SUBDIVISION PARCEL ALONG WITH OTHERS FOR THE PURPOSE OF EFFECTING IMPROVEMENTS TO THE OVERALL SUBDIVISION IS REMOTE.

E. ANY PLANS YOU AS PURCHASER MIGHT HAVE OF DEVELOPING THIS LAND IN ANY WAY SHOULD BE THOROUGHLY INVESTIGATED BY CONSULTING WITH APPROPRIATE LOCAL GOVERNMENT OFFICIALS PRIOR TO YOUR PURCHASE OF THE PROPERTY.

***Questions 12A — 12D** [Master File Item]*

SOILS, FILLED GROUND AND GEOLOGICAL INFORMATION

■ **Reference:**

Real Estate Law: 11010(b)(14), (15)

■ **Why required:**

This gives the consumers the information needed to learn more about soil conditions of the project and alert them to potential problems.

■ **Items for disclosure:**

- Where soils, filled ground and geologic information is available
- Any special costs that will be incurred by the lot buyer as a result of the installation of a building foundation or any other construction due to unusual soil/geological conditions
- If there is fill in excess of 2 feet
- That a soils report was not prepared (if waived by local agency).

■ **Item is unacceptable if:**

- P.O. Box is filled-in instead of street address for the location of soils, filled ground and geologic reports
- Private company is filled-in instead of public agency for the location of the reports.

  ☞ Ordinarily only the name and address of the public agency where soils/filled ground/geological conditions information can be obtained needs to be submitted. However, submittal of the referenced report(s) or other information may be necessary if there are unusual conditions worthy of being special noted, e.g., if the project is built on bay fill and may be subject to extensive settling, if project may be subject to land slides, if map predates soils report requirement, etc.

Information must also be provided, for example, as to who will maintain erosion prevention construction, if any; what potential hazards exist, if any; limitations as to where on the lots structures may be built, if any; what financial arrangements have been made to complete and/or maintain same. Such information would be special noted in the public report.

The following is included in all public reports for subdivisions located in unincorporated areas of Los Angeles County:

INFORMATION CONCERNING SLOPES, PLANTING AND DRAINAGE REQUIREMENTS ARE AVAILABLE AT THE COUNTY OF LOS ANGELES, DEPARTMENT OF PUBLIC WORKS, 900 S. FREMONT AVE., ALHAMBRA, CALIFORNIA 91803..

***Question 14A — 14E** [Master File Item]*

WATER INFORMATION

■ **Reference:**

Real Estate Law: 11010(b)(6) and 11018(f)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

If lots are being offered for residential use, the developer must show that a source of potable domestic water either is available or will be available [Section 11018(f)]. If the water system is installed, the developer must submit verification that the system has been completed and paid for and a letter from the water supplier

stating that ample water for normal use and fire protection, if any, is available and will be furnished on demand without exception to each and every lot. DRE will not accept a water supplier who is not a regulated supplier or unit of government.

■ Elements for review:

Mutual Water Companies

Mutual water companies must have a current permit to issue shares from Department of Corporations (DOC), or a mutual water company certification as described below.. The permit is valid for one year and must be renewed annually until all shares have been issued. The permit, to be acceptable, must be current and must authorize the issuance/sale of a number of shares which is equal to, or greater than, the total number of subdivision interests to be served by the mutual water company.

A mutual water company must be established when two or more lots will be served by a single water source which is not maintained by a regulated entity. Effective January 1, 1998, the Department of Real Estate assumed jurisdiction from DOC over mutual water companies formed on or after January l, 1998 to provide water service to subdivisions. DOC will only issue new or renewed water permits to sell shares in mutual water companies which were formed prior to January 1, 1998. The changes to the Corporations Code which became effective January 1, 1998 provide that the subdivider may elect to apply for a current water permit from DOC if the mutual water company was originally formed prior to January 1, 1998 or submit to DRE's jurisdiction and comply as indicated below. The subdivider cannot offer shares in a mutual water company without either a valid permit from DCC or documenting the public report application with the information required by the new statutes.

If the water supplier is a mutual water company which was formed *prior* to January 1, 1998, the developer must comply with either 1 or 2 below. If the water supplier is a mutual water company to be formed on or after January 1, 1998, the developer must comply with 2 below.

1) Submit a copy of the current permit to issue shares granted by the Department of Corporations.

2) Submit all of the following;

   - Executed RE 699B Mutual Water Company Certification.
   - A copy of the certificate of the Director of Public Health as required by 116300 to 116385 of the Health and Safety Code.
   - A copy of the statement signed either by the engineer who prepared the engineer's report pursuant to Section 14312(a)(7) of the Corporations Code or a person employed or acting on behalf of public agency or other independent qualified person, that the water supply and distribution system has been examined and tested and operates in accordance with the design standards of Chapter 2, Part 7 of Division 3, Title I of the Corporations Code.

     ☞ For purposes of compliance with this item, a statement from the subdivider as an "independent qualified person" is not acceptable. The statement must be from a licensed or regulated person or entity authorized to perform the examination and testing needed.

   - Evidence of completion of the water supply and distribution system servicing all lots to be covered by the public report.

     ☞ Section 110l8.5(a)(2) is not applicable. DRE is flexible as to the form of evidence deemed acceptable. The subdivider's statement that "all of the water supply and distribution facilities serving the interests to be covered by the public report are complete" is acceptable.

   Include in the public report any costs the purchaser will be required to pay for stock in the mutual water company.

Private Water Companies

The Public Utilities Commission (PUC) has jurisdiction over private water companies. If the subdivider indicates that a private water company will supply water, submit completed PUC Form 615-4 along with a private water company letter showing that the system is installed or financial arrangements have been made to

install same. Refer to PUC website: www.cpuc.ca.gov.

If the water system is not completed, the developer must furnish evidence showing: (1) That adequate financial arrangements have been made to insure completion, and (2) the completion date. Some private water companies may not be within PUC jurisdiction and will require a complete investigation by DRE before the Public Report can be issued.

PUC's Prior Approval

The Public Utilities Commission has named certain water supply companies that have an adequate water supply and the means to develop additional supplies if needed for all subdivisions that can reasonably be expected to be developed within their service areas.

Public utility water suppliers must be confirmed via PUC, approval letter, except that such confirmation is not required if the water company is one of those listed under item 14B(3) in RE 624 and RE 628 and the subdivision is within their existing service area. The approval letter authorizes the water company to provide service to the project, as it has met the minimum fire flow requirements for public safety established by the PUC.

☞ For all public utility water suppliers (including those listed under item 14B(3) in RE 624 and RE 628) serving a subdivision outside their existing service area, a PUC confirmation approval letter will still be required.

To obtain the approval letter, submit the "Water Source and Certification Questionnaire" (Standard Practice U-18-W) to: the

Public Utilities Commission
Attn: Water Division
505 Van Ness Avenue, Rm 3106
San Francisco, CA 94102-3298

Please reference the DRE file number and the assigned Deputy's name and upon PUC approval, submit a copy of the PUC's confirmation of approval letter to DRE.

All Water Suppliers

For all water suppliers, if the water lines have been, or will be installed by the subdivider at no cost to purchasers, submit a letter from the water supplier which states that:

- The system is installed and paid for or that there are financial guarantees in place to assure that the system will be installed and paid for. If financial guarantees, describe briefly and provide evidence thereof.
- Ample water for normal household use and fire protection (if any, per item 10 of RE 624 or RE 628) is available.
- Water will be furnished on demand, without exception to *each and every lot/unit*, or if there are exceptions, a list of excepted lots/units must be included and the reasons for the exceptions stated.
- Water is potable.

  ☞ The above is not required if the city or county had a current Master Geographic Letter (MGL) on file with DRE at the time the subdivision map was conditionally approved. The MGL must apply to the water supplier, cover the installation of water lines and include a determination that domestic water to be served to residents in the subdivision is potable and there is ample water for normal use to serve each and every lot/unit on demand and for fire protection. If purchaser must pay for installation of water lines to the lot/unit, submit a letter from the water supplier which includes all of the points above, but in lieu of the first point (verification of installation and/or financial guarantees), include the approximate cost, at current rates, to install water lines from the nearest water main to the farthest lot/unit which is part of the offering.

Types of Districts which may Supply Water

The following types of districts may be formed to supply water. Generally, the indicated requirements will

apply in addition to the applicable provisions above.

- Community Services District — Evidence that district is established and that tract is within the district. Require evidence that there is an adequate supply of potable water, and that the distribution system is complete, or some guarantee of installation of the distribution system. Obtain amount of bonded indebtedness and include in public report.
- Irrigation District — Letter from local health authorities or from the State Department of Public Health indicating that the water is potable. Letter from district indicating that financial arrangements have been completed and that water will be supplied to each lot or parcel in the tract.
- County Water District — Letter from the district stating that the subdivision is within the district and that arrangements have been made for the installation of the distribution system. If the system is to be put in under a bond issue, require evidence of the sale of the bonds and amount. If general obligation bonds make tax rate excessive, show rate in public report.
- State Water District — Letter from the district stating that the tract is within the district and stating whether district has its own tax collector who will levy assessments under separate billing of the district. If district has its own tax collector, obtain pertinent details and include a general statement in the public report. If district is to be financed by a bond issue, require evidence of the sale of bonds.

Individual Wells

If individual wells are proposed for water supply, the subdivider must submit: (1) a California licensed well driller's estimated cost for drilling and casing a well; (2) cost of a pressure pump and system; (3) depth at which water may be found; (4) letter from local health authority stating that individual wells will be permitted and that water is potable and the type of sewage disposal system permissible with wells on the size of lot proposed. When the subdivider cannot get a letter from the Health Department stating that water is potable, DRE will accept a well driller's letter which states that he has drilled on the property or in the vicinity and has found a source of potable water. DRE will also require that a provision similar to the one for septic systems be added to the purchase agreement and/or escrow instructions.

☞ If there is doubt as to sufficiency, a geologist's report as to the availability of underground water may be required in addition to the licensed well driller's estimate in order to insure that sufficient water will be available for each of the parcels offered, assuming that all parcels will be occupied in the future with wells drilled upon each.

The local authorities should be contacted to determine if there is a requirement that the well must be installed on each lot at the subdivider's expense prior to closing the escrow or that a statement from the purchaser must be obtained waiving installation of the well as a condition of sale.

If such a statement is required, submit the statement or notice from local authority citing the special requirement or conditions and applicable verification of completion or appropriate escrow instructions.

If a geologist's report as to availability of underground water is required by local authorities, submit the report.

Upon review of the file, the DRE may require a geologist's report even if it is not required by local authorities.

If there are any special requirements or conditions imposed by local (city/county) authorities for the installation of individual wells, they should be described.

In some cases, individual wells are not suitable as the source of water supply, or water wells for individual parcels are not permitted by local health authorities or are not feasible because water rights are reserved from the individual parcels. But there must be a water supply if the lots are to be sold for residential, commercial, industrial, recreational or agricultural purposes. If the subdivider states the lots will be sold only as raw land and there is no present or foreseeable use, DRE will require information from the subdivider which will disclose the cost of installing a water system to each lot to be offered for sale.

POTABILITY OF WATER MUST BE ASSURED BY LOCAL AUTHORITIES.

500 or More Dwelling Units

Subdivisions containing more than 500 dwelling units may be subject to the imposition of a condition pursuant to subdivision (b) of Section 66473.7 of the Government Code. Section 11010(b)(6) of the Business and Professions Code requires subdividers to demonstrate water availability by submitting written verification obtained pursuant to Government Code Section 66473.7, however, evidence of financial arrangements relating to the installation of the water system must also be submitted.

■ **Items for disclosure**:

- Any costs to purchaser
- The use of wells; depth at which water might be found
- The existence of a mutual water company
- If a mutual water company, will shares be sold or given to purchasers? If sold, at what cost?
- Name of provider if subdivision is located in an unincorporated area
- Any difficulties in obtaining water
- Potential availability limitations
- Bonded indebtedness to be assumed
- Statement relative to potability
- Need for conditioning equipment, if any
- Permits required
- Any problems.

■ **Item is unacceptable if:**

Availability of water cannot be demonstrated.

☞ If there is no water source, a final public report will generally not be issued.

In some special instances, a raw land final subdivision public report may be issued. All raw land final subdivision public reports will include the special note shown under Question 11.

***Questions 15A — C** [Master File Item]*

UTILITIES SUPPLIERS

■ **Reference:**

Real Estate Law: 11010(b)(6)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

Any unusual factors which may affect suitability of the project must be disclosed.

■ **Items for disclosure:**

- Identity of utility suppliers
- Non-availability of certain utilities (e.g., all-electric subdivision)
- Extension costs which purchaser may incur.

Question 15B — C

EVIDENCE OF FINANCIAL ARRANGEMENTS IS REQUIRED IF UTILITY (gas, electric, telephone) LINES ARE NOT DIRECTLY ADJACENT TO THE PROJECT.

A letter from the serving utility companies which includes an extension cost estimate and/or an installation cost estimate is required when the purchaser has to pay additional installation and/or extension fees for utility service beyond normal connection charges.

■ **Definition:**

Written evidence from the utility company that financial arrangements have been made for complete installation of utility lines to all lots/units in the subdivision; or the utility companies' written estimates of the cost to the purchaser of bringing lines to the farthest lot/unit in the tract and which state the distance of free extension and the extension cost per foot.

■ **Reference:**

Real Estate Law: 11010(b)(6)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

This is another item that assures that all facilities represented by the developer will actually be completed.

If there is any additional cost to the purchaser, it is an item that is disclosed. Otherwise, such cost information may not always be readily available to the buyer.

■ **Elements for review:**

- Verification that subdivider has paid any required fees.
- Utility is available to subdivision
- Utility will be provided at no cost to the purchaser or costs to purchaser for installation and or extension of service are disclosed
- Any required financial arrangements have been made.

■ **Items for disclosure:**

- Cost to purchasers of extension if no financial arrangements have been made
- Non-availability of utility
- Cost to extend or hookup to farthest lot
- Distance to farthest lot.

■ **Item is unacceptable if:**

- No financial arrangements have been made and no information is given regarding the cost of extension to purchasers
- Costs are not clearly stated.

Question 15D

SCHOOL DISTRICTS

Required of all subdivision projects.

■ **Definition:**

Self-explanatory.

■ **Reference:**

Real Estate Law: 11010(b)(12)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

If statement from School District(s) has been received, discloses schools servicing the subdivision and any special conditions.

If the above statement is not received, the name, address, and phone number of school district(s) will be disclosed in the public report so that purchasers may contact the district as to school information.

■ **Elements for review:**

- Statement from school district(s) indicating every school serving the subdivision.
- If above not available, copy of letter requesting above information and signed statement that such a request was solicited from the school district(s).

■ **Items for disclosure:**

- Schools servicing subdivision and any special conditions.
- If statement(s) from school district(s) not available, name, address, and phone number of school district(s) servicing project.

■ **Item is unacceptable if:**

- It is improperly executed; does not include all districts.

  ☞ As a general rule, there is not need to disclose the entire letter submitted by the school district, only the name and address of the schools (if available) and the school district. However, it is deemed appropriate additional information may be included regarding the schools, busing, desegregation and other similar issues. Comments regarding funding arrangements for schools should not be included. If there are any special school taxes or assessments, that information should be placed in either the taxes or assessments portion of the public report.

  If information has not been received from the school district, DRE will not hold up issuance, but will include the name, address and phone number of the school district in the public report.

Question 16A — 16C [Master File Item]

OFF-SITE IMPROVEMENTS INFORMATION

■ **Reference:**

Real Estate Law: 11010(b)(9) and 11018(d)

■ **Why required:**

This makes the developer declare what will be included in the project such as streets, drainage, and street lights. It is the basis for evaluating the adequacy of the financial arrangements for completion.

■ **Items for disclosure:**

- Any improvements which will not be completed prior to conveyance of the first subdivision interest, estimated completion dates (if the estimated date is unusually far in the future); any financial obligation to be assumed by buyer.

Question 16B

OFF-SITE IMPROVEMENTS

Evidence for adequate financial arrangements for completion of all off-site improvements must be demonstrated if they are part of the offering.

Copies of improvement agreements and bonds, instruments of credit, or evidence of cash deposit are required when off-site improvements will be secured by bonds, instruments of credit, or cash deposits. If the city or county had a current Master Geographic Letter (MGL) on file with DRE at the time the subdivision map was conditionally approved, which specifically covered each improvement, submittal of the improvement agreement and security device are not required.

■ **Definition:**

Self-explanatory

■ **Reference:**

Real Estate Law: 11010(b)(9) and 11018(d)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

To insure that the off-site improvements will actually be completed; to prevent misrepresentation.

■ **Elements for review:**

- Must cover all uncompleted off-site improvements.

■ **Items for disclosure:**

- Date by which improvements will be completed if it is longer than 1 year after issuance of the public report
- Basic facts of financial arrangements for completion.
- Costs to buyer if improvement installation is deferred.

■ **Item is unacceptable if:**

- Does not insure completion
- Amount of financial guarantee is inadequate.

Question 17 *[Master File Item]*

FLOOD AND DRAINAGE

■ **Reference:**

Real Estate Law: 11010(b)(8) and 11018(f)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

Any unusual flood conditions may affect suitability of the project, or there may be unusual costs to purchasers

as a result thereof.

■ **Items for disclosure:**

- Any unusual flooding conditions
- That the project lies within the flood hazard boundaries of the National Flood Insurance Administration
- That the project lies on the flood plain
- That special permits may be required in order to build.

Question 17A — C

FLOOD LETTER

Required if the project is not covered by a Master Geographic Letter containing a flood clause.

■ **Definition:**

A report from the local flood control agency detailing flood land drainage conditions affecting the subdivision.

■ **Reference:**

Real Estate Law: 11010(b)(8) and 11018(f)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

This report provides information about flooding and drainage that may affect the purchaser's decision regarding the property. Any unusual or dangerous conditions may entail additional upkeep or insurance costs.

■ **Elements for review:**

- Any potential dangers or problems.

■ **Item for disclosure:**

- Any potential dangers, problems or special costs.

If the subdivision is located within the Sacramento and/or San Joaquin Drainage Districts, a statement must be submitted from the drainage district(s) which stipulates that the property does not lie in the areas covered by the floodway or flood plain maps of the Reclamation Board.

This statement ensures that the property is not located in an area that is subject to periodic flooding.

If the local flood agency will not issue a report until after final map approval, submit a statement to that effect, signed by the subdivider, and tabbed as 17A. Then submit the report as soon as it is available (prior to issuance of the final public report).

Question 18A – D [Master File Item]

TAXES, SPECIAL DISTRICTS AND SPECIAL ASSESSMENT DISTRICTS.

Required when the subdivision lies wholly or partially within a special district, county service area, community facilities district, or a special assessment district, having authorized but unissued bonds.

■ **Definition:**

Self-explanatory

■ **Reference:**

Real Estate Law: 11010(b)(9)/(10)/(11)

Comm. Regulation: 2792, 2792.1

Civil Code: 1102.6(c)

■ **Why required:**

Sections 11010(b)(9)/(10) of the Business and Professions Code require submittal of a true statement or reasonable estimate, if applicable, of the amount of any indebtedness which has been or is proposed to be incurred by an existing or proposed special district entity, taxing area, or assessment district, within the boundaries of which the subdivision, or any part thereof, is located and which is to pay for the construction or installation of any improvement or to furnish community or recreational facilities to such subdivision and which amounts are to be obtained by ad valorem tax or assessment, or by a special assessment or tax upon the subdivision, or any part thereof.

The purpose of this question is to obtain information about any taxes or assessments which the purchaser must pay. If it is determined that this information is material, it will be disclosed in the public report.

"Special district" refers to any district already formed, or to be formed, which will provide off-site improvements, utility and maintenance services such as water, sewer, lights, streets, drainage, etc., this applies to county water districts, sanitation districts, community facilities districts created pursuant to the Mello-Roos Community Facilities Act of 1982, as amended, Improvement Bond Acts, Municipal Improvement Acts, Landscape and Lighting Districts Act, etc.

The Notice of Intention requests information regarding additional costs, assessments, etc., to which the purchaser may be subject in order to benefit from improvements or services planned for the subdivision. This also assures that financial arrangements are adequate to install required improvements to the project such as water, sewer, streets, lighting, etc.

Section 11010(b)(11) of the Business and Professions Code requires a notice pursuant to Section 1102.6(c) of the Civil Code disclosing information regarding supplemental property tax bills.

■ **Elements for review:**

- All applicable information provided
- Verify which portions of the subdivision lay within the district.

■ **Items for disclosure:**

- Any increase in the property tax rate over the statewide average of 1.25% attributed to general obligation bonds.
- Supplemental property tax bills
- Assessment per subdivision interest per year
- Name of district or purpose
- Ability of district to sell more bonds or increase taxes
- Duration of assessment and total amount due
- Method of payment of assessment — separately or as part of property taxes?
- Interest rate of bonds.

■ **Item is unacceptable if:**

- Information is incomplete.

***Question 19A — E** [Master File Item]*

STREETS, COMPLETION, MAINTENANCE VERIFICATION, AND ACCESS

■ **Reference:**

Real Estate Law: 11018(d), (f)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

- Legal access must be assured; otherwise the project would fail the suitability test.
- It must be established who is to be responsible for the maintenance of the streets. If the subdivider states that a governmental agency will maintain them, that must be demonstrated and any special conditions must be stipulated.
- The completion of all off-site improvements must be financially assured to prevent misrepresentation.
- If streets will not be publicly maintained, an agreement specifying which roads are to be maintained, by whom, and the method of maintenance, including costs should be submitted. In a standard subdivision, CC&R language similar to the following might be used relative to private maintenance of roads/streets:

  a. It is hereby agreed and declared that each lot shall bear an equal share of any and all costs required for maintenance and repairs of the roads within said subdivision under the terms and conditions as set forth herein.

  b. Said roads described above shall be used by all owners of property within the subdivision bounding thereon for ingress, egress and/or utilities.

  c. The right of way created by said easement shall be maintained in a good, passable condition under all traffic and weather conditions.

  d. Repairs on the said private roads shall be required when the majority of the owners of properties reach an agreement in writing that repairs are needed. Pursuant to said agreement such owners shall obtain three bids from licensed contractors and shall accept the lowest of said three bids and shall then initiate the repairs of said road with each owner bearing his pro rata share of the costs and expense thereof, regardless of whether such owners shall have concurred with said agreement or not.

  e. Every owner of property who shall cause or allow in any manner said private roads to be used, traversed, or altered by vehicular traffic or otherwise, thereby causing damage to the surface thereof as may be determined by a majority of the owners of property bounding thereon, shall bear as his/her responsibility the costs and expenses of repairing such damage.

  f. If a dissenting owner shall not pay his/her pro rata share of costs and expense immediately upon receiving the bill for the same, the remaining such owners shall be entitled without further notice to institute legal action for the collection of funds advanced on behalf of such dissenting owner in accordance with the provisions of California Civil Code Section 845, and shall be entitled to recover in such action, in addition to the funds advanced, interest thereon at the current prime rate of interests, until paid, all costs and disbursements of such action, including such sum or sums as the court may fix as a reasonable attorney's fees."

- Streets or roads are not usually considered common area or common facilities if the boundaries of the purchaser's lot extend to the middle of the street or road and each lot purchaser has an easement of travel with other lot purchasers over such easements. [In some developments, however, the HOA has the responsibility to maintain such easements possibly creating a planned development as defined in Civil Code Sections 1351(b) and 1351(k).]

- A road or street on National Forest Land does not usually constitute adequate access to a subdivision unless:

  a. The road is part of a public agency road system (usually county).

  b. The subdivider has obtained a right-of-way and road use permit from the Forest Service for use by all lot purchasers.

  c. Special arrangements have been made with the Forest Service such as establishing a homeowners association which will comply with use permit conditions and which will maintain the road(s).

  If the road is classified by the United States Forest Service as a "forest development road", a road use permit is not required.

As applicable, prospective purchasers should be informed of the estimated incremental cost they will bear for maintaining roads in the subdivision, per linear foot; per lot total and subdivision total.

■ **Elements for review:**

- Description of roadway to be covered
- All roads shown on the map must be covered by the completion arrangements
- Cost per linear foot per annum to maintain roads
- Reasonableness of arrangements
- Terms of agreement
- Provisions for enforcement
- Cost per lot per annum to maintain roads, etc.
- Consistency of document.

■ **Items for disclosure:**

- Standards to which roads will be constructed
- The fact that access is by a non-public road, as applicable
- Access street(s) privately maintained
- Costs of maintenance
- Roads that are not all-weather surfaced
- Unusual maintenance costs or problems
- Road maintenance agreement
- Method of enforcement
- Any special conditions to be met before road maintenance will begin
- When road maintenance will begin, if not upon completion of roads
- Any liability of the buyer for road maintenance prior to public maintenance.

  ☞ If there are no provisions for maintenance of private streets/roads, the following special note will be included in the public report:

Special Note

The roads within this subdivision are private. No provision for their repair and maintenance has been made by the developer. All repair and maintenance of these private roads will be your responsibility, individually, collectively or proportionately to the use of the road easement by you.

If you and your neighbor cannot agree on pro rata shares, or upon the need or extent of repair and

maintenance, it may be necessary for you to appeal to the proper superior court for the appointment of an impartial arbitrator, or for the determination of the court, as to the pro rata shares. (Reference: Civil Code Section 845.)

■ **Item is unacceptable if:**

- Roads are not completed and there is no evidence of arrangements for completion
- Documentation does not show that all lot/unit buyers will have legal access.
  - ☞ If there is no physical, year-round vehicular access, a final public report will generally not be issued.

In some special instances, a raw land final subdivision public report may be issued. All raw land final subdivision public reports will include the special note shown under Question 11.

Question 20A–C

PURCHASE MONEY HANDLING

RE 600A (Blanket Bond)

Required when subdivider selects a method of purchase money handling which requires posting a security device.

■ **Definition:**

Business and Professions Code Sections 11013.2 and 11013.4 identify the purchase money handling conditions with which the subdivider must comply. Section 11013.2 applies when one or more blanket encumbrances exist as defined in 11013, and no release clause per 11013.1 is applicable. Section 11013.4 applies when there is no blanket encumbrance. The subdivider has the option of posting a security device to comply with one of the following Sections: 11013.2(c), 11013.2(d), 11013.4(b) or 11013.4(f) rather than impounding the purchase money. If the purchase money will be impounded per Section 11013.2(a), the depository must meet the requirements of Regulation 2791.4. If the purchase money will be impounded per Section 11013.4(a), the depository must meet the requirements of Regulation 2791.4 or 2791.6, as applicable.

■ **Reference:**

Real Estate Law:	11013, 11013.1, 11013.2, and 11013.4
Comm. Regulation:	2791.2, 2791.4, 2791.6, 2792 and 2792.1
Civil Code:	2995

■ **Why required:**

By posting a security bond, the subdivider may utilize purchase monies up to the monetary obligation of the bond, prior to the time that a proper release from the blanket encumbrance is obtained and/or until title to the subdivision interest is delivered to the purchaser. If the purchaser does not receive title free of the blanket encumbrance and/or if the subdivider is unable to refund the purchase money, the purchaser's recourse is to make claim against the security. The amount of the bond is determined by the subdivider; however, all purchase money which exceeds the amount of the bond must be impounded pursuant to Sections 11013.2(a) and 11013.4(a) of the Business and Professions Code.

■ **Elements for review:**

- RE 600A Blanket Bond
  - The subdivider's name must exactly match the name of the principal on the security or a rider must be submitted which adds that subdivision principal.
  - Attached to any bonds, riders or notices from a surety, must be a current attorney-in-fact for the entity signing on behalf of the surety.
  - A bond contains the surety's seal.

■ **Items for disclosure:**

- A description of the method of purchase money handling. (See Section 11013.5)
  - If the subdivider's financial interest in the proposed escrow company is equal to or greater than 5 percent.
  - ☞ Section 2995 of the Civil Code provides that no real estate subdivider shall require, as a condition precedent to the transfer of real property containing a single-family residential dwelling, that escrow services effectuating such transfer shall be provided by an escrow entity in which the subdivider owns or controls 5% or more of the escrow entity.

■ **Item is unacceptable if:**

- Principal on the bond differs from public report applicant
- Signatures are photocopies, not original
- No attorney-in-fact and power-of-attorney were submitted for entity signing on behalf of the surety.
- Attorney-in-fact or power-of-attorney are not current.
- Appropriate surety seals are not affixed to a bond.
  - ☞ Surety bonds are posted in compliance with either 11013.2(c), if there is a blanket encumbrance, or 11013.4(b) if there is no blanket encumbrance. If the security device is other than a bond, the section of compliance falls as an alternative arrangement under either 11013.2(d) or 11013.4(f).

***Property Subject to Blanket Encumbrance**:* Regulation 2791.1(b)(2)(A) allows escrow to close regardless of an existing blanket encumbrance if the holder of the deed of trust has executed a release agreement, as identified in the regulation, which agreement has been deposited with the escrow holder and the buyer has been provided with a policy of title insurance insuring against loss by reason of the deed of trust. It is not required that the release agreement be submitted to or approved by the DRE, however, sample language has been provided in RE 643M. This arrangement is considered to fall within the parameters of Section 11013.2(d).

If the property is subject to a blanket encumbrance, it will be required that the sample buyer's escrow instructions contain a provision whereby close of escrow is conditioned upon either 1) release of the blanket encumbrance or 2) the escrow holder has an executed release agreement and the buyer will receive a policy of title insurance insuring against loss by reason of the deed of trust (refer to Question 39 in the application). In addition, the sample purchase contract must disclose the conditions for escrow closure if the release agreement will be used per Regulation 2791.1. (Refer to Question 23 in the application.)

***Question 21** [Master File Item]*

REAL PROPERTY SALES CONTRACT (Also known as a Land Contract, Contract of Sale or an Installment Sales Contract.)

When a real property sales contract is used, documentation must be submitted.

☞ All information and documentation submitted pertinent to use of real property sales contracts must bear the following certification language and the original, not photocopied, signature of the subdivider, or the subdivider's *authorized* agent:

I/We hereby certify under penalty of perjury that the statements and/or documents submitted pertinent to use of real property sales contracts are full, true, complete and correct.

Signature _____

Capacity of Signer _____

■ **Reference:**

Real Estate Law: 10029, 11010(b)(5), 11013.2, 11013.4, 11018.5(b), and 11200

Comm. Regulation: 2791, 2791.1, 2791.9, 2792 and 2792.1

Civil Code: 2985 et seq.

■ **Why required:**

This question provides DRE with the basic facts regarding the subdivider's financing intentions.

When real property sales contracts are to be used by the subdivider, it must be demonstrated that an impound is properly set up or that there is an acceptable alternative (trust) and that the buyer's interests will be protected.

■ **Elements of review:**

A trust agreement as indicated by Regulation 2791.9 must be used. The name and address (physical address not P.O. Box) of the trustee to be used must be submitted.

Documents must be submitted which show in detail how the method chosen will be carried out, such as escrow instructions, agreements, recorded mortgage or deed of trust, and a copy of the trust instrument containing all the required provisions of Regulation 2791.9 must be submitted.

A copy of the real property sales contract completed in sample form containing all of the required provisions of the Regulation selected, as well as Section 2985 et seq. of the Civil Code, must be submitted.

The DRE Legal Section ordinarily reviews such trust agreements and contracts.

■ **Items for disclosure:**

- Subdivider's plan to comply with DRE Regulations
- Description of real property sales contract terms i.e., when title is conveyed, etc.

■ **Item is unacceptable if:**

- It does not comply with DRE regulations.

Question 22A Not Applicable

Question 23 *[Master File Item]*

DEPOSIT RECEIPT/AGREEMENT TO PURCHASE

Required Document

■ **Definition:**

The sales agreement (or deposit receipt), must be completed in sample form to show the substance of a typical sales transaction. It contains the terms and conditions of a binding contract between a buyer and seller of real property.

The applicant's signature on the document certifies that the sales agreement used in subdivision transactions will conform to the exemplar submitted.

■ **Reference:**

Real Estate Law: 11010(b)(5) 11018.12 and 11200

Comm. Regulation: *2790.2*, 2791, 2791.1, 2791.8, 2792 and 2792.1

Civil Code: *1675-1681*

Code of Civil Procedure: *1298*

■ **Why required:**

The substance of the sales agreement is of prime importance in assessing whether purchasers are being dealt with fairly and within the law.

■ **Elements of review:**

- Lead-based paint disclosure (24 CFR Part 35 and 40 CFR Part 745), if applicable.
- HUD/OCRA provisions, if applicable
- Alternative dispute resolution provisions in compliance with Regulation 2791.8 and Section 1298 of the Code of Civil Procedure, if applicable.
- Specification of the requirements of Section 11018.12 of the Business and Professions Code and Regulation 2790.2 (Conditional Public Report), if applicable.
- Provisions of Regulation 2791(a) - Refund of Deposit
- Liquidated damages clause must conform to Civil Code Sections 1675-1681 and Regulation 2791
- Disbursements and charges against purchase money must be enumerated and costs estimated if there are to be any such charges/disbursements; Regulations 2791(b)(1) and (2).
- Disclosure of conditions for close of escrow if 2791.1 applied.
- Unreasonable provisions in conditions of sale
- Description of interest to be conveyed
- Applicant's signature certifying that the instrument is a sample of the sales agreement to be used.

■ **Item for disclosure:**

- Any unusual provisions.
  - ☞ Provisions for the sale of vacant lots obligating Buyer to enter into a construction contract with Seller or Seller controlled entity.
  - ☞ Option to repurchase property by Seller
  - ☞ Clauses imposing chares against purchasers.
  - ☞ Resale restrictions
  - ☞ Conditional public report provisions (Section 11018.12 of the Business and Professions Code and Regulation 2790.2)
- Lead-based paint disclosure (24 CFR Part 35 and 40 CFR Part 745), if applicable.
  - ☞ HUD/OCRA provisions, if applicable.

■ **Item is unacceptable if:**

- It is not signed by the applicant
- There are unreasonable provisions in the conditions of sale
- Liquidated damages provision is in violation of the Civil Code or Regulation 2791
- The interest to be conveyed is not adequately described.
  - ☞ ***Disbursements for Some Closing Costs; Regulation 2791(b)***

  The sales agreement may provide for payments to be made out of purchase money to third parties for:

  1. Credit reports
  2. Escrow services
  3. Preliminary title reports

4. Appraisals
5. Loan processing services.

If the sales agreement provides for the payments set out above, it also must include:

1. A statement specifically enumerating the items to be charged against purchase money.
2. The subdivider's estimate of the total amount of the costs that may be charged against purchase money. (The sample contract need not show exact figures.)

☞ ***Prompt return of buyer's funds; Regulation 2791(a)***

The purchaser is to receive a full refund of all purchase money, including subsection 2791(b) third-party disbursements, within 15 days after the date for close of escrow set forth in the sales contract or some later date of closing mutually agreed upon by the buyer and the subdivider.

☞ ***Liquidated Damages Clause***

Civil Code Sections 1675, 1676, 1677 and 1678 are referenced in Regulation 2791(c)(1). The specific requirements in these clauses are designed to ensure fairness to the consumer. The following items in that law are of critical importance:

1. The clause must be set forth in 10 point bold type or contrasting red 8 point bold type.
2. It must provide a space for the initials of both buyer and seller to assure that both parties will specifically sign/initial the clause.
3. The liquidated damages may not consist of an amount in excess of all of the money advanced by the purchaser toward the purchase of the interest contracted for, except as provided in Civil Code Section 1675(d),(e),(f) and (g).

Subdividers who include liquidated damages provisions in their deposit receipts may follow the sample language indicated below:

"If Buyer fails to complete the purchase of the property by reason of a default of Buyer, Seller may pursue any remedy in law or equity that it may have against Buyer on account of the default; provided, however, that by placing their initials here, Buyer ____ and Seller ____ agree that:

a) $_____, an amount not to exceed the money remitted by Buyer under the terms of the contract for acquisition of the subdivision interest (Purchase Money Deposit), shall constitute liquidated damages payable to Seller if Buyer fails to complete the purchase of the property because of a default by Buyer.

b) The payment of such liquidated damages to Seller shall constitute the exclusive remedy of Seller on account of the default of Buyer.

c) Liquidated damages shall be payable to Seller out of Buyer's deposit toward purchase of the property according to the following procedures:

    1. The Seller shall give written notice ("Seller's notice and demand"), in the manner prescribed by Section 116.340 of the Code of Civil Procedure for service in a small claims action, to escrow holder and to Buyer that Buyer is in default under the Contract and that Seller is demanding that escrow holder remit $_____ from the Purchase Money Deposit to Seller as liquidated damages unless, within 20 days, Buyer gives escrow holder Buyer's written objection to disbursement of Purchase Money as liquidated damages ("Buyer's objection").

    2. Buyer shall have a period of 20 days from the date of receipt of Seller's notice and demand in which to give escrow holder Buyer's objection.

    3. If Buyer fails to give escrow holder Buyer's objection within 20 days from the date of receipt of Seller's notice and demand: (a) escrow holder shall promptly remit the amount demanded to Seller; and (b) Seller is released from any obligation to sell the property to Buyer.

    4. If Buyer gives escrow holder Buyer's objection within 20 days from the date of receipt of Seller's

notice and demand, then the determination as to whether Seller is entitled to the disbursement of Purchase Money as liquidated damages, and every other cause of action that has arisen between Buyer and Seller under the Contract shall be settled by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association subject to each of the following:

(i) Any fee to initiate the arbitration shall be paid by the Seller, provided that the arbitration costs and fees, including any initiation fee, ultimately shall be borne as determined by the arbitrator.

(ii) The venue of the arbitration proceeding shall be in the county in which the property is located unless the parties agree to a different location.

(iii) The arbitrator shall be appointed within 60 days of the administrator's receipt of a written request to arbitrate the dispute. In selecting the arbitrator, the provisions of Section 1297.121 of the Code of Civil Procedure shall apply. The arbitrator may be challenged for any of the grounds listed therein or in Section 1297.124.

(iv) The arbitrator shall be authorized to provide all recognized remedies available in law or equity for any cause of action that is the basis of the arbitration. [Optional – The arbitrator shall not have the authority to award punitive damages.](v) Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Seller may agree to indemnify and hold escrow holder harmless from any claim by Buyer arising out of any distributions made by escrow holder in accordance with, and pursuant to, the provisions of this paragraph.

Remittance of the aforesaid liquidated damages to Seller shall preclude any right of action Seller may have to contest the reasonableness of the amount actually paid as liquidated damages or the validity of this liquidated damages provision.

[Note: Civil Code Sections 1675(d),(e),(f) and (g), are applicable to this provision. Section 1675(d) provides 'If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.']

- Subdivisions (c)(3) and (c)(4) of Regulation 2791 are for the benefit of the subdivider rather than the purchaser and may be included in the liquidated damages clause at the option of the subdivider.

A similar procedure shall be followed for the installation of options which the purchaser desires for his individual subdivision interest. If escrow does not close and buyer is not in default, all purchase money paid into escrow, including the cost of any options, must be returned. Seller's recourse is liquidated damages.

The buyer and subdivider may contract separately for such optional extras, but the amount paid by the buyer must be handled in accordance with the above provisions.

These provisions are not applicable if the buyer enters into a separate contract for optional extras with a third party contractor, one who is *in no way* associated with the subdivider.

☞ ***Alternative Dispute Resolution Provisions***

Subdividers who include alternative dispute resolution provisions in their sales agreement must comply with Regulation 2791.8.

☞ ***Notice of Arbitration Provisions***

Code of Civil Procedure Section 1298 requires that specific notice be included whenever there is a provision requiring binding arbitration in any contract, including a deposit receipt, to convey real property. (This law also applies to listing agreements between principals and real estate agents.)

If the provision requiring binding arbitration is included in a printed contract, it shall be set out in at least 8-point bold type or in contrasting red in at least 8-point bold type. In the case of a typewritten contract, the provision is to be set out in capital letters.

The statutory notice may either precede or follow the arbitration provision and be set out either in at least 10-point bold type or in contrasting red print in at least 8-point bold type. If the notice is included in a typed contract, it must be in capital letters.

The notice explains that the parties to the contract are agreeing to have any disputes decided by neutral arbitration and that they are giving up any right to have the dispute litigated in a court or jury trial as well as rights to discovery and appeal unless these rights are specifically included in the arbitration of disputes provision. The parties must also initial their acknowledgment of the contents of the notice.

All contracts which include a binding arbitration provision must include the required notice in the prescribed format.

Question 24A — C

FINANCING, PROMISSORY NOTE AND DEED OF TRUST

Required when the subdivider is offering his/her own financing and/or financing with balloon payments, subsidized interest and loan payments, "creative financing," equity sharing, any type of "affordable housing" or similar financial plans are being offered.

■ **Definition:**

The trust deed is a security device wherein the bare legal title to the property is conveyed to the trustee, who will hold it in trust until the loan is repaid. The borrower is in possession of the physical property; the lender holds the note which is the buyer's promise to repay the loan in the manner specified on the note.

■ **Reference:**

Real Estate Law: 11010(b)(5)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

These documents include information that the prospective purchaser will require if (s)he is going to accept financing from the subdivider.

■ **Elements for review:**

- Maturity date
- Acceleration clause, if any
- Balloon payment provisions, if any
- Prepayment penalty, if any
- Subsidies, negative amortization, equity sharing, etc., if any
- Affordable housing finance programs, if any.

■ **Items for disclosure:**

- Acceleration clause, if any
- Balloon payment, if any
- A prepayment penalty, if any
- A late charge, if any
- Creative financing plans, if any
- Affordable housing finance programs, if any.

■ **Item is unacceptable if:**

- It violates lending laws
- It does not set forth all applicable provisions of the agreement.

☞ Loan provisions:

1. Prepayment penalties, if included, are subject to Civil Code Section 2954.9.
2. Late charges are subject to the limitations in Civil Code Section 2954.5.
3. If a due-on-sale acceleration clause is included, the provisions of Civil Code Sections 2949 and 2954.5 and Federal Law (Garn-St. Germain Depository Institutions Act of 1982) should be considered. The subdivider is advised to consult an attorney to resolve any concerns (s)he may have.

Civil Code Sections 2956 -2963 require designated written disclosures to be made regarding a transaction for the purchase of a dwelling unit for not more than four families if the transaction involves extension of credit by the vendor and there is an *arranger of credit*.

It is recommended that the subdivider obtain advice from his/her attorney as to whether or not these Civil Code Sections apply to the sales program.

"Arranger of Credit" is defined in Section 2957(a) of the Civil Code as:

1. A person, other than a party to the credit transaction (except as provided in Paragraph 2), who is involved in developing or negotiating credit terms, participates in the completion of the credit documents, and directly or indirectly receives compensation for arrangement of the credit or from any transaction, or transfer of the real property which is facilitated by that extension of credit. As used in this paragraph, "arranger of credit" does not apply to an attorney who is representing one of the parties to the credit transaction.
2. A party to the transaction who is either a real estate licensee, licensed under provisions of Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code, or is an attorney licensed under Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code if neither party to the transaction is represented by an agent who is a real estate licensee. In any transaction in which disclosure is required solely by the provisions of this paragraph, the obligations of the article shall apply only to a real estate licensee or attorney who is a party to the transaction, and not to any other party.
3. An arranger of credit does not include a person acting in the capacity as an escrow in the transaction.
4. Persons described in Paragraph (2) who are acting in the capacity as an escrow holder in the transaction shall nevertheless be deemed arrangers of credit where such person acts on behalf of a party to the transaction or an agent of such party in the development or negotiation of credit terms. Neither the completion of credit documents in accordance with instructions of a party of his or her agent nor the furnishing of information regarding credit terms to a party of his or her agent shall be considered to be the development or negotiation of credit terms.

The "disclosures" which an "arranger of credit" must make to the purchaser and to the seller are set forth in Civil Code Section 2963. It is the obligation of the "arranger of credit" to acquaint him/herself with the provisions of this Code Section.

Question 25 *[Master File Item]*

SAMPLE GRANT DEED

Required document if offering is not limited to leasehold estates.

■ **Definition:**

The document, completed in sample form, reflects the typical method of transferring title to purchasers.

■ **Reference:**

Real Estate Law: 11010(b)(5) and 11018.5(b)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

This is a basic conveyance document. It describes what the purchaser will get and under what circumstances. This document must be properly setup or misrepresentation of the most drastic type would occur. The intent is to verify that the grant deed to be used to convey subdivision interests includes all "subject to" items such as reservations (e.g., water, mineral, oil and gas) easements and ordinarily project restrictions.

■ **Elements for review:**

- Correct grantor
- Incorporation by reference of project CC&Rs, as applicable
- Water, mineral, oil and gas reservations, if any
- Correct format, e.g., unit and % undivided interest in the building or common area in a condominium
- Correct legal description, as per map
- Access, easements, encroachments, etc.
- The document must be signed by the applicant to confirm that all grant deeds used will conform to the exemplar.

■ **Items for disclosure:**

- Special reservations or covenants
- Easements created.

■ **Item is unacceptable if:**

- It is not signed by the applicant
- It is improperly drafted.

☞ Care must be taken to assure that the purchaser receives all the elements of the subdivision interest to which (s)he is entitled. In the case of a condominium, this could include a unit, an undivided interest in the building or common area, plus any exclusive easement rights. In the case of a planned development, the subdivision interest generally would consist of the purchaser's lot, an easement over the common area and a membership in the association. Of course, if the lot owners, rather than the association, will own the common area, a percentage interest in that common area would be granted to each owner. The common area must be specifically described and the grant deed, the condominium plan and the CC&Rs must be consistent as to what the purchaser will own.

Question 26B *[Master File Item]*

SAMPLE LEASES/SUBLEASES

Required if subdivider is selling leasehold estates.

☞ Item 26A asks whether interests in the project will be rented. The Deputy maintains the option to request exemplar rental agreements.

■ **Definition:**

Sample of the lease/sublease that is used to show an agreement for specified terms of the lease if leasehold interests or sub-leasehold Interests are the offering.

■ **Reference:**

Real Estate Law: 11010(b)(5) and 11018.5(b)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

The terms of the lease must be reviewed to determine if the lessee's normal use of the property is assured.

■ **Elements for review:**

- Leases should be subject to CC&Rs, if any
- Reasonableness of terms and conditions
- Costs (e.g., fixed, tied to cost of living index, etc.)
- Right of entry
- Ability to sublease
- Assignability
- Option to buy
- Disbursement of assets, if any, at end of lease term.

■ **Items for disclosure:**

- Number of interests to be leased
- Terms of lease
- Possible effect on the project
- Any special provisions affecting the lessee
- Notation that a copy of the agreement must be provided by the applicant.

■ **Item is unacceptable if:**

- Lease cannot be subordinated to CC&Rs in common interest subdivision
- Lease is a blanket encumbrance without proper release clauses.

  ☞ If the intention is to use lease-option agreements as a sales device, a copy of the lease-option agreement completed in sample form must be submitted.

  All money (whether or not it is a portion of rent money) which is designated to be applied to the purchase price must be impounded in accordance with Section 11013 of the Business and Professions Code.

Question 27 *[Master File Item]*

SUBDIVISION MAP

A tentative map is only required if a recorded map or a map waiver is not submitted at the time of filing. Evidence of approval must be submitted with a tentative map, unless the Department has made a finding that because of processing delays, a tentative map has not been approved but will be approved within a reasonable amount of time.

Prior to issuance of the final public report, a recorded map must be submitted, unless a waiver was already submitted.

■ **Definition:**

A tentative map is a document prepared by a licensed civil engineer or registered land surveyor in accordance with regulations established under the State of California Subdivision Map Act (Government Code Section 66410, et. seq) which is examined and approved by various agencies of the local jurisdiction.

A final map is a recorded document approved by the city or county certifying that the conditions and requirements of the tentative map approval have been met and that all certificates appearing on the final map

have been satisfied.

■ **Reference:**

Real Estate Law: 11010(b)(3)

Comm. Regulation: 2792, 2792.1

■ **Why required:**

The Department cannot issue a preliminary or conditional public report for a project until the local jurisdiction has tentatively approved the project, unless the Department has made a finding that because of processing delays, a tentative map has not been approved but will be approved within a reasonable amount of time.

Tentative map approval shows serious intent and viability of the project. This is an important safeguard for persons making reservations on an un-built project. The tentative map provides an overall picture of the subdivision. It must be submitted to local authorities in the early stages of the project. A review thereof gives a preliminary overview of any problems that may exist.

The final recorded map will evidence that compliance with the city or county regulations or requirements listed for tentative map approval has, in fact, been effected. It is a means of verifying dedication and acceptance of roads and streets, easements, utilities, rights-of-way, etc.

■ **Elements of review:**

- Numbering of lots
- Access to each lot
- Use factors and suitability
- Dedications and acceptances
- Special notes or special studies zones, if any
- Setbacks
- Unbuildable portions of residential lots, setbacks, limited building pad areas
- Hazards, if any
- Right-of-way, if any
- Easements (e.g., high tension lines) which may not appear on the title report
- Reservations of mineral, oil and gas.

■ **Items of disclosure:**

- Special dedications
- Hazards
- Requests for disclosures
- Easements
- Limitations as to use.

■ **Item is unacceptable if:**

- It is impossible to determine if map has tentative approval or that because of processing delays, a tentative map has not been approved but will be approved within a reasonable amount of time. (applicable to tentative map only; preliminary public report and MFP/SCA only)
- It reveals improper phasing, such as some phased one-lot condominiums
- It reveals common areas in a standard filing
- Title page is not submitted with final map

- It pertains to property different from that described in the title report
- It does not bear evidence of recordation (applicable to final map only).

  ☞ If there is additional information pertinent to this subdivision filed or recorded in the city or county which is not fully set forth on the recorded map, i.e., a "separate document" or "additional map sheet" pursuant to Government Code §66434.2, a complete set of copies of any and all such "separate documents" or "additional map sheets" must be submitted.

  If any special fees will be charged a vacant lot purchaser when said purchaser obtains a building permit or prior to occupancy (e.g., school impact fees, fees for sewer, water, drainage, traffic mitigation fees, park fees, street tree fees, transportation improvement fees, fire and/or police department impact fees, etc.), the question must be answered "yes" and a standard disclosure note will be included in the public report.

Question 28

CONDOMINIUM PLAN *(for condominium projects only)*

A proposed condominium plan is required if the recorded condominium plan is not submitted at the time of the filing.

A recorded condominium plan must be submitted before a final public report can be issued.

■ **Definition:**

A diagram and/or legal description of what constitutes the condominium units and common areas with respect to location, size and boundary lines, including porches, balconies, garages, etc.; it includes the appropriate proposed certifications on the definition page.

■ **Reference:**

Real Estate Law: 11010(b)(3)

Comm. Regulation: 2792.1

Civil Code: 1351(e)

■ **Why required:**

As the basic description of the units and common areas, the proposed Condominium Plan shows the overall picture. Because it defines the various elements of the project, it is useful in verifying representations made elsewhere in the application, e.g., parking spaces, storage areas, areas to be conveyed, (un)equal fractional interest computations, easements or phasing.

The recorded plan legally establishes the condominium status of the project and the breakdown of ownership interests.

■ **Elements for review:**

- Number of units and parking spaces, storage units, etc.
- Relationship of various project elements
- Map or description of land surface (must match subdivision map)
- Diagrammatic floor plan identifying each unit; its relative location and approximate dimensions
- Owner's certification consenting to recordation of the plan (signed and acknowledged by owner of record and beneficiary of each recorded deed of trust)
- Condominium plan must be consistent with the CC&Rs and the grant deed (definitions, etc.).
- Definitions of the elements of the condominium.

■ **Items for disclosure:**

- Unusual project setup
- Easements created therein and other pertinent information from definition page
- What will be conveyed and to whom.

■ **Item is unacceptable if:**

- It is not recorded (not applicable to proposed plan)

  If the condominium plan is recorded without a certificate of consent from **both** the record owner and beneficiary of each recorded deed of trust.

- It is inconsistent with the grant deed and the definitions in the CC&Rs
- The definition page is not submitted
- It is not legible
- The definitions are inconsistent with the diagram shown in the plan.

Question 29

PLOT PLAN OR SITE PLAN *[Master File Item]*

Required Document

■ **Definition:**

An architect's bracket map produced to scale size defining the location and the (wall) construction detail to specify the location of the project improvements, units and common area amenities.

■ **Reference:**

Comm. Regulation: 2792.1

■ **Why required:**

Another view of the project, the plot plan may be useful in pointing out facilities not disclosed in the Notice of Intention or RE 624A. It is needed for budget review to verify the data provided in the proposed budget. It is particularly useful in phased projects because it shows the relationship of the various phases to one another in the total project not just that portion covered by a single filing.

■ **Elements for review:**

- All improvements should be shown
- Recreational facility structures should be distinguished from residential structures (by colors or labels, etc.)
- Multi-phase/multi-map boundaries should be delineated
- All common areas should be shown
- Proposed parking facilities should be shown.

■ **Items for disclosure:**

NA

■ **Item is unacceptable if:**

- It is not legible
- It does not show sufficient detail
- It is not to scale.

Question 30

VICINITY MAP *[Master File Item]*

A required Document

- **Definition:**

  A legible map showing the location of approaches to the subdivision and the surrounding area in sufficient detail to show all of the roads leading to the subdivision from the main highway.

- **Reference:**

  Real Estate Law: NA

  Comm. Regulation: 2792, 2792.1

- **Why required:**

  This map is often used by staff to quickly find the project when a field inspection is required and to locate the project relative to surrounding uses, access, etc.

- **Elements for review:**

  - Must show location, approaches and landmarks
  - Any potential hazards.

- **Items for disclosure:**

  - Cross streets (in size and location paragraph)
  - Unusual adjacent uses.

- **Item is unacceptable if:**

  - It is not legible
  - It does not show the immediate vicinity.

Question 31

RE 624A/HOA COMMON FACILITIES

Common Facilities Information

- **Definition:**

  Self-Explanatory

- **Reference:**

  Real Estate Law: 11018(d),(e)

  Comm. Regulation: 2792.1

- **Why required:**

  This gives a clear idea of what common facilities the developer intends to build.

- **Elements for review:**

  Common facilities and common areas must be consistent with those detailed elsewhere in the filing.

- **Items for disclosure:**

- List of common facilities
- List of common areas
- The proposed completion date.

■ **Item is unacceptable if:**

- It is inconsistent with other filing representations, such as budget, questionnaire
- It is incomplete or incorrectly filled out.

☞ Reference RE 624, item 31B:
If common area facilities or areas will be available for use by the public, the particulars relating to such public use must be submitted. Public use would be a disclosure item. If public use is a map approval condition, the particulars imposed by the local jurisdiction must be submitted for review and may be disclosed, as applicable. If public use is not imposed by the map process, the reasonableness thereof would be reviewed, e.g. would public use overburden the facilities and/or interfere with owner use.

☞ Reference RE 624, item 31C:
If the common area lot(s) will be conveyed to the homeowners association prior to the completion of all common area amenities/improvements and if the subdivider will not provide the homeowners association with $1,000,000 of liability insurance coverage that fact would be disclosed in the public report, as set forth below. Such liability insurance coverage shall extend to individual unit purchasers in a condominium project if the common area is conveyed to the homeowners association prior to completion of the common area improvements.

If such insurance will *not* be provided or the liability amount is less than $1,000,000, this disclosure statement will be included in the public report:

> "The subdivider states the common area will be conveyed to the Association prior to completion of construction of facilities, however, there will be (no) (insufficient) liability insurance to protect the Association in the event of accidents occurring during construction, for which the Association may be liable. Homeowners should take immediate action to obtain sufficient liability insurance."

Question 32A, 32B(2), 32C *[See end of this section for 32B(1)]*

COMPLETION OF COMMON AREAS AND FACILITIES

Required in common interest subdivisions if all common area improvements are not to be completed before issuance of the public report.

■ **Definition:**

An explanation of the arrangements to assure completion of the project.

■ **Reference:**

Real Estate Law: 11018.5(a)(1) and 11018.5(a)(2)

Comm. Regulation: 2792.1, 2792.3, 2972.4

■ **Why required:**

Protect purchasers and homeowners association from mechanic liens arising from development of the project along with assuring completion of relevant infrastructure and common areas as represented by the developer. Compliance with Section 11018.5(a)(1) assures buyers that their commitment to purchaser and commitment of deposit funds will be with a development reasonably assured of being constructed.

Compliance to Section 11018.5(a)(2) may be effected as per any of the subsections. If Subsection "A" or "C" or "D" or "E" of Section 11018.5(a)(2) is chosen, the management documents must include the provisions of Regulation 2792.4.

- To comply with Subsection A (Bond) or Subsection C or Subsection D or Subsection E, submit a copy of completed RE 611A, Planned Construction Statement, the proposed security device (refer to RE forms listed below) and proposed Common Area Completion Security Agreement and Instruction to Escrow Depository (RE 613).

  If the project is a condominium or if it is a planned development which contains attached "cluster" type construction or includes any common areas to be constructed, then the amount of the bond, cash, set-aside letter, letter of credit, etc., must either cover all improvements and cluster residential structures not completed at the time of issuance of the public report or the subdivider must provide other methods for guaranteeing completion using the other alternatives.

  Upon notification of approval by DRE of RE 611A amounts, a completely executed RE 611 and RE 613 (along with evidence of completion of any parts of the project completed and not covered by this security or other arrangement) must be submitted.

  ☞ For set-aside letters, use RE 629 and submit with RE 613 and RE 611A.

  For letters of credit, use RE 611D and submit with RE 613 and 611A.

  If a different arrangement is proposed, submit the proposal for review along with the RE 611A.

- To comply with Subsection B (Escrow Instructions) of Section 11018.5(a)(2), submit the appropriate escrow instructions, and submit a lender's commitment letter or other evidence of compliance with Section 11018.5(a)(1).

  If the project is a condominium, include appropriate compliance wording such as:

  "This escrow shall not close, funds shall not be released from escrow, and title shall not be conveyed to the purchaser, UNTIL ALL the following conditions have been met:

  I. All common facilities and improvements on Common Area Lot No(s). _____ of Tract No. _____ including _____ structures containing a total of _____ residential units have been completed as evidenced by a Notice of Completion being recorded (as defined in Civil Code Section 3093) covering all the foregoing units, lots and improvements.

     and

  II. The statutory period for recordation of all mechanic's lien claims has expired, *or*, the purchasers and the homeowners association* are provided policies of title insurance with endorsements against mechanic's liens."

     * Include homeowner association if it holds title to any common areas. The homeowner association policy shall be in an amount no less than the cost of common area improvements.

  ☞ Even if the project is complete, the above language should be included in the escrow instructions to protect the purchaser from possible mechanic's liens.

  If the project is a "cluster" type planned development, include appropriate compliance wording such as:

  "This escrow shall not close, funds shall not be released from escrow, and title shall not be conveyed to the purchaser, until *all* the following conditions have been met:

  I. The cluster residential structure which contains this lot's (Lot No. ____) living unit has been completed, as evidenced by a Notice of Completion (as defined in Civil Code Section 3093) being recorded covering all lots in this particular cluster (Lot Nos. _____ of Tract No. _____). Cluster residential structures are located on the following groups of lots in this subdivision:

     Lots# _____, Lots #_____, Lots#_____.

     and

  II. All common facilities and improvements on Common Area Lot No(s). _____ of Tract No.

_____ have been completed, as evidenced by a Notice of Completion (as defined in Civil Code Section 3093) being recorded covering all the foregoing improvements.

and

III. The statutory period for recordation of all mechanic's lien claims has expired, or, the purchasers and the homeowners association are provided policies of title insurance with endorsements insuring against mechanic's liens."

☞ Even if the project is complete, the above language should be included in the escrow instructions to protect the purchaser from possible mechanic's liens.

If the project is a "non-cluster housing" type planned development (all houses are separate, detached structures), include appropriate compliance wording, such as:

"This escrow shall not close, funds shall not be released from escrow, and title shall not be conveyed to the purchaser, until *all* the following conditions have been met:

I. All common facilities including the improvements on Common Area Lot No(s). ___ of Tract No. ___ have been completed, as evidence by a Notice of Completion (as defined in Civil code Section 3093), being recorded covering all the foregoing improvements.

and

II. The statutory period for recordation of all mechanic's lien claims has expired, or, the purchasers and the homeowners association are provided policies of title insurance with endorsements insuring against mechanic's liens."

☞ Even if the project is complete, the above language should be included in the escrow instructions to protect the purchaser from possible mechanic's liens.

In an Existing Subdivision Interests or common interest conversion project, if there is renovation work to be completed and the subdivider elects compliance with Section 11018.5(a)(2)(B) of the Business and Professions Code, the escrow instructions should state substantially the same as the following:

No escrows will close until all renovation work to the common area and facilities has been completed and a notice of completion for _____* has been filed and time for all claims of all applicable liens has expired or, in lieu thereof, a title insurance policy will be issued to the purchaser and to the homeowners association which contains endorsements against all claims of liens recorded or as yet unrecorded.

* It must be clear what specific renovation work is to be completed, e.g., *pool refinishing, roof replacement, exterior painting, etc*.

- If RE 621 procedure will be used, submit a copy of completed RE 621. Also see RE 621B which contains instructions for use of the procedure.

  ☞ The "RE 621" procedure gives the subdivider the flexibility of switching from escrow instructions which prevent the closing of escrows until the total project has been completed and is free of all liens, to an alternative method (bond, etc.) of compliance with Section 11018.5(a)(2) without obtaining an amended final public report. When using this procedure, the subdivider must furnish evidence of compliance with Section 11018.5(a)(1), usually a lender's commitment letter. After a final subdivision public report has been issued, the RE 621 provides that escrows cannot close until the common facilities are completed free and clear of liens and encumbrances or until a bond (or other security) along with a planned construction statement and RE 621A are deposited in escrow. The security (bond, etc.) and attendant documents should guarantee completion of the common areas and facilities that remain incomplete as of the date of submittal of the RE 621A, security and planned construction statement to DRE. In a cluster planned development or condominium project, the security should include the remaining uncompleted residential units unless a notice of completion is required in accordance with other escrow instructions. The bond or other security and completed RE 621A should be furnished at least ***45 days*** prior to intended close of any escrows to allow DRE enough time for review and approval of the security amount.

- To comply with Subsection D of Section 11018.5(a)(2) of the Business and Professions Code, along with the proposed security device for completion of the common area, submit a copy of the proposed (title insurance) endorsement which insures against any mechanic's liens that may be incurred as a result of construction in this phase and any future phases of the project, *whether the construction is performed by the present subdivider or any successor in interest.*

  The title insurance endorsement would insure the individual owners and the homeowners association (as applicable) against any statutory lien for labor or materials attaching to the land arising out of any work of improvement whether such improvements are under construction or completed at the date of policy or arising from any future construction.

☞ If such protection against possible future mechanic's liens is not available for any reason, a subdivision final public report will not be issued on a phased single-lot condominium project, unless compliance with the provisions of Section 11018.5(a)(2) of the Business and Professions Code, Subsections (A) or (B) or (C) or (E) is effected for all phases of the condominium project.

If the project will be a phased, single lot condominium project and *all the residential units will be completed or guaranteed for completion by a bond or other security*, the following wording is acceptable in escrow instructions:

"This escrow shall not close, funds shall not be released from escrow, and title shall not be conveyed to the purchaser, UNTIL ALL the following conditions have been met:

I. All common facilities included in the project outside the residential structures and all common facilities and residential units located in _____ (Buildings #1, #2, etc.), on Lot # ____ of Tract # _____ have been completed as evidence by a Notice of Completion (as defined in Civil Code Section 3093), being recorded covering all the foregoing units, lots and improvements.

and

II. The statutory period for recording all mechanic's liens have expired, or the purchasers and the homeowners association are provided policies of title insurance insuring against mechanics' liens.

and

III. Each purchaser and the homeowners association have insurance which contains the following endorsement:

"The Company hereby insures the insured against loss which said insured shall sustain by reason of:

any statutory lien for labor or materials attaching to said Land, arising out of any work of improvement under construction or completed at the date of policy as to the condominium building in which the insured's separate unit is located

and/or by reason of any statutory lien for labor or materials attaching to the Land arising out of any work of improvement within Lot No. ___ of Tract ____ whether such improvements have been completed, are under construction or are to be constructed after the Policy Date"

☞ For phased projects, it is recommended that the provisions of Regulation 2792.4 and 2792.16(c) always be included in the CC&Rs regardless of the completion guarantee method chosen for phase I. The inclusion of the Regulation provisions allow the subdivider to maintain flexibility as to completion guarantee options for subsequent phases with no need to amend the CC&Rs to add these Regulation provisions at a later date.

☞ If the project is a "cluster" type planned development or a condominium project, compliance with Section 11018.5(a)(1) is necessary to demonstrate viable intent to complete the project. Normally a lenders' commitment letter is submitted. Other options for meeting this requirement:

1. Letter from construction lender indicating sufficient funds available.
2. Copy of trust deed and/or note indicating encumbrance is for "constructions."
3. Title report indicating property subject to a construction loan.
4. Evidence of sufficient construction having been accomplished for the project. This is a very subjective determination and usually would be answered by the budget reviewer.
5. Letter from lending institution indicating a sufficient line of credit for construction purpose.
6. Sufficient funds are available to the developer from his own resources. This may be shown by furnishing a balance sheet prepared by an accounting firm, 10-K filed with S.E.C., etc.
7. Security devices posted such as completion bond or letter of credit covering the project. (This does not apply to the RE 621 procedure.)

■ **Elements for review:**

- Commitment letter or other evidence of viable intent to complete the project including, as applicable, an amount committed for residential units or "cluster" lots and an amount committed for common facilities.
- Amount of security must be consistent with DRE Budget Review Section determination
- Letter of credit/set-aside letter (if submitted) must include requisite elements per RE 611D (Letter of Credit) or RE 629(Set-Aside Letter) along with Common Area Security Agreement (RE 613)
- Correct beneficiary (i.e., homeowners association) on security instrument
- RE 611 (Bond) and RE 611A along with Common Area Security Agreement (RE 613)
- Escrow instruction language and endorsements.

■ **Items for disclosure:**

- Inventory of facilities included in the offering
- Estimated completion date
- Amount of bond, letter of credit, set-aside letter, etc.

■ **Item is unacceptable if:**

- Financial arrangements are inadequate
- There is no evidence of viable intent (e.g., lender's commitment letter not submitted)
- Escrow instructions are not appropriate
- RE 611A is not attached to the security instrument
- Beneficiary on security instrument is incorrect
- Completion of common area, etc., is not guaranteed prior to release of purchase money from escrow
- Documents are not executed
- RE 611A does not list all uncompleted improvements.

Question 32B(1)

RECORDED NOTICE OF COMPLETION

Required if all common area improvements (or renovations in an Existing Subdivision Interests or condominium conversion project) are to be completed before the public report is issued.

■ **Definition:**

A recorded document certifying that the entire work of improvement (usually the whole project) or the renovation work is complete (Civil Code 3093).

■ **Reference:**

Real Estate Law: 11018.5(a)(1) and 11018.5(a)(2)

Comm. Regulation: 2792.1

Civil Code: 3093

■ **Why required:**

Real Estate Law requires that before a public report can be issued on a common interest subdivision, the applicant must show "reasonable arrangements" (viable intent) to build the entire project [Section 11018.5(a)(1)], and also must show secure assurances that the common areas will be completed [Section 11018.5(a)(2)]. A notice of completion for the entire project is the most conclusive evidence that these requirements are met. These requirements protect the consumer from buying an interest in a subdivision that might never be completed as the subdivider represented it would be completed.

■ **Elements for review:**

- Must be signed by the owner authorizing the work
- Must cover the property under review
- Should cover all common area improvements
- Recording data.

■ **Items for disclosure:**

- Statement that the improvement(s) covered by the Notice of Completion is completed.

■ **Item is unacceptable if:**

- It is improperly executed; is not recorded; does not describe the completed project, facility, or renovation work in sufficient detail to assure that all common area and improvements have been completed..

Question 33

RE 639: SUPPLEMENTAL QUESTIONNAIRE EXISTING SUBDIVISION INTERESTS/CONDOMINIUM CONVERSION

Required if project is an "Existing Subdivsion Interest" as defined by Regulation 2790.8.

■ **Definition:**

Self-Explanatory.

■ **Reference:**

Real Estate Law: 11018.5(d),(e) 11018.5(a)(2)

Comm. Regulation: 2792.1, 2790.8 and 2790.9

Civil Code: 1134

■ **Why required:**

To provide specialized information required only for Existing Subdivision Interests or condominium conversion projects.

☞: ***Existing Subdivision Interest Disclosure***

In order to comply with Regulation 2790.8, the subdivider must provide each buyer of an Existing Subdivision Interest (as defined) an Existing Subdivision Interest Disclosure Statement in the form described in Regulation 2790.9. This disclosure statement must be provided to each buyer as soon a practicable before the transfer of title. If the disclosure statement is delivered after the execution of an

offer to purchase, the buyer shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate the purchase agreement by delivery of a written notice of termination to the Seller.

☞ ***Substantial Defects or Malfunctions in Major Systems Disclosure***

In order to comply with Civil Code Section 1134, the subdivider must make a personal inspection of all units, common areas, and related common facilities for any substantial defects or malfunctions in major systems and deliver to prospective buyers either a written statement listing all known defects or malfunctions or a written disclaimer. Copies of a statement of defects or a statement of disclaimer proposed to be used must be submitted. If the disclosure statement is delivered after the execution of an offer to purchase, the buyer shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate the purchase agreement by delivery of a written notice of termination to the subdivider.

■ **Elements for review:**

- All statements complete and all questions answered
- Check any proposed renovation work for financial guarantees.
- Sample Existing Subdivision Interest Disclosure Statement in compliance with Regulation 2790.9, if applicable
- Sample disclosure statement or disclaimer in compliance with Section 1134 of the Civil Code, if applicable
- Purchase agreement and escrow instructions providing for the delivery of the Existing Subdivision Interest Disclosure Statement prior to the close of escrow.
- Purchase agreement and escrow instructions providing for the delivery of the disclosure statement or disclaimer used to satisfy Section 1134 of the Civil Code prior to the close of escrow.
- Inspection reports concerning the current condition of major building components.

■ **Items for disclosures:**

- The fact that the project is an Existing Subdivision Interest as defined by Regulation 2790.8
- Engineering reports on improvements have not been submitted, if applicable
- Age of structure.
- Financial arrangements made for the completion of renovation work.
- If the subdivider did not provide inspection reports from licensed contractors or engineers concerning the current condition of major building components.
- Delivery of the Existing Subdivision Interest Disclosure Statement to satisfy Regulation 2790.8 and right of termination, if applicable
- Delivery of the disclosure statement or disclaimer used to satisfy Section 1134 of the Civil Code and right of termination, if applicable.

■ **Item is unacceptable if:**

- There are inadequate financial arrangements for renovation
- A necessary permit is not submitted (e.g., as in the case of a City of Santa Monica conversion).

Question 34

SUBSIDY/MAINTENANCE AGREEMENT

Required when subdivider subsidizes assessments or maintains all or part of a common interest project.

■ Definition:

A subsidy agreement is an agreement between the subdivider and the association whereby the subdivider agrees to pay a certain portion of assessments for a certain length of time. This is usually done in phased projects where the bulk of the common facilities are installed in the first phase. The homeowners' assessments would be burdensome if the subdivider did not pay a large part of the total assessments. As subsequent phases are built and sold out, the per unit/lot assessments usually decrease and the subsidy program is phased-out and/or dropped. Additionally, the agreement may cover maintenance or other work the developer may perform in lieu of paying a full assessment on units/lots which are subject to assessments.

A maintenance agreement is similar, but makes no promise of any specific cost savings. It does provide that should there, be a cost savings, they will be shared equally by all owners. The agreement usually involves subdivider maintaining some portion of the project in lieu of paying the full portion of the assessment obligation.

■ Reference:

Real Estate Law: 11018(i) and 11018.5(e)

Comm. Regulation: 2792.1 and 2792.10

■ Why required:

A subsidy or maintenance type of program must be backed up by a proper contract, financial assurances for performance, and proper accounting procedures.

■ Elements for review:

- Agreement and security device must cover a specific subsidized amount for a specific term
- Must have termination date and a ceiling on the subsidy amount
- Must be reflected by a separate security agreement and escrow instructions along with a security device per Regulation 2792.10. (DRE forms available: RE 643E and 643K bond, RE 688 set-aside letter, or 643L letter of credit.)
- Agreement must guarantee that all budget items for reserves for replacement or major repair are funded.
- Agreement must provide for the monthly accounting to the association and if the subsidy is other than cash, it shall also include a description and valuation of the goods and services furnished per the agreement.

■ Items for disclosure:

- Existence of subsidization or maintenance program
- A description of the nature, extent and duration of the subsidy and the device whereby this commitment is secured
- Estimate of monthly assessments per unit necessary to meet the revenue requirements for maintenance and operation of the common areas if there was no operational subsidization by the subdivider
- Information from which a prospective purchaser will be able to calculate his monetary obligations for maintenance and operation of the common areas upon expiration of the subsidization agreement or the subdivider's inability to carry out the agreement for any reason
- Since subsidies sometimes pertain to proposed future phases of the development and continuance of the subsidy may be contingent upon or may terminate upon annexation of a subsequent phase, a statement to the effect that the subdivider is under no legal obligation to annex additional units to the original development. Prospective purchasers should not, therefore, rely upon anticipated future development and annexation when making a decision with respect to purchase of a unit.
- Unusual elements of the agreement.

■ **Item is unacceptable if:**

- It fails to meet the requirements of Regulation 2792.10
- It is not executed (not applicable to proposed agreement).

Question 35

CONTRACTS OBLIGATING THE HOMEOWNERS ASSOCIATION

Required when any contracts, including management arrangements or shared use agreements, exist, or are proposed, that will obligate the HOA and wherein the subdivider or his subsidiary is a party to the contract.

☞ The terms "joint maintenance agreement," "joint use agreement," or "shared use agreement" (collectively "joint maintenance agreements") refer to a contract between a community association and the owner(s) of adjoining land located outside the boundaries of the homeowner association, covering the use, management, maintenance, operation and/or control of community, recreational or other facilities included in a common interest offering. In phased projects with interdependent phases (e.g., access to phase two is via the private streets/drives in phase one, etc.) there must be provisions for shared maintenance until any dependent phase, not covered by the public report, is annexed and assessments begin, e.g., a road maintenance agreement which binds the lots in phase two until they are annexed to the project and are paying assessments. Shared maintenance includes repairs, taxes, insurance and administrative costs.

■ **Definition:**

Self-Explanatory

■ **Reference:**

Real Estate Law: 11018.5(d)/(e)

Comm. Regulation: 2792.1

■ **Why required:**

All contracts are reviewed to protect the homeowners association from a "sweetheart deal," i.e., unreasonable monetary gain by the subdivider or others at the expense of the HOA.

■ **Elements for review:**

- Duties of management entity and monthly cost to HOA
- Termination provisions of the HOA
- Is it a subsidization agreement?
- Usually should not extend beyond one year.

■ **Items of disclosure:**

- Any unusual provisions.

■ **Item is unacceptable if:**

- It cannot be terminated for cause upon notice
- Any terms are unreasonable
- The HOA may be charged (or may be obligated to pay) an amount greater than the budget line-item amount
- Unreasonably long contract term.

Question 36

USE OF COMMON AREA FOR SALES *[Master File Item]*

Required when any portion of the common area will be used by the subdivider to carry out the sales program subsequent to conveyance of one or more lots/units.

- **Definition:**

  An agreement regulating and restricting the subdivider's use of the common area for sales and advertising programs.

- **Reference:**

  Real Estate Law: 11018.5(d)/(e)

  Comm. Regulation: 2792.1, 2792.8 and 2792.15

- **Why required:**

  A program of this sort affects the purchasers' use of the common area. As such, it should be clearly and properly arranged and disclosed.

- **Elements for review:**

  - Portion(s) of common area to be utilized
  - Purpose(s) of utilization
  - Any consideration/compensation involved
  - Termination date of the agreement (limited duration required)
  - Whether or not the facilities involved will still be available to the HOA.

- **Items for disclosure:**

  - Existence of agreement
  - Terms of agreement
  - Expiration date of agreement
  - Other pertinent information.

- **Item is unacceptable if:**

  - The agreement is improperly drafted
  - The agreement imposes unreasonable restrictions on purchasers' use of the common area
  - The agreement is for an unreasonable length of time
  - There is no provision to assure the subdivider's obligation to maintain (including reserves) and refurbish the area used for sales and/or advertising programs.

Question 37A & B

PROPOSED HOMEOWNERS ASSOCIATION BUDGET(S) INCLUDING PROJECT INVENTORY

Required for all common interest filings.

- **Definition:**

  An inventory of common areas and facilities and the estimated costs to maintain and/or replace them, set forth on RE 623.

■ **Reference:**

Real Estate Law: 11018.5(e)

Comm. Regulation: 2792.1

■ **Why required:**

The monthly assessment needed to maintain the common area is a vital factor in the purchaser's decision and ability to buy. The DRE reviews the assessment estimates (budget) in order to insure that the developer represents a realistic cost to the public. Were the assessments underestimated, the homeowners would face much higher expenses in the future resulting in possible deterioration of the common areas and/or foreclosures for non-payment, if the owners were unable to afford the higher assessment amounts. A reasonable budget will lessen the possibility of such eventualities.

■ **Elements for review:**

- The entire RE 623 is audited by DRE Budget Review staff for completeness and accuracy
- The Budget Review staff makes sure that the assessment plan does not conflict with management document provisions.

■ **Items for disclosure:**

- Amount or range of approved assessments
- Proration scheme
- Assessment payment by the subdivider.

■ **Item is unacceptable if:**

- RE 623 is incomplete or errors are found
- If a format other than the RE 623 is used.

☞ See the "Operating Cost Manual for Homeowners Associations" for details of what is required for a budget. Also, see Question 51 for the duplicate budget package contents and setup for single-phase and multi-phase projects and for those projects which have an existing homeowners association. For information on a "range of assessment" or a "____ assessment" procedure for setting up an assessment program for a master planned development, refer to Question 38. Use of the services of an experienced budget preparer is highly recommended.

CAPITAL CONTRIBUTION/START-UP FUND

In order to provide "start-up" funds for an association, the subdivider may set aside in some manner a portion of the purchase price of lots or units to be added to the homeowners association account, or may charge each purchaser a specified amount to be paid directly to the homeowners association upon close of escrow. This is generally called a Capital Contribution and is not a prepayment of the periodic assessment obligation.

It is not necessary to obtain financial assurances or a pre-payment from the subdivider to ensure timely payment of these funds unless the subdivider opts to have a like sum paid to the association for each unsold lot/unit on a future date (usually six (6) months). If the subdivider chooses the latter, he/she must arrange for a like sum to be paid on behalf of each unsold lot or unit in the subdivision. This may be accomplished by either depositing an amount, equal to the obligation for all interests in the project, in the association's account up front and then provide through escrow instructions for reimbursement to himself from the additional fees to be collected from purchasers. Alternatively, the subdivider may arrange during the initial period for the payment by each purchaser directly to the homeowners association as each escrow closes, and then deposit a lump sum at the end of the date certain covering the obligation of all unsold lots or units. As the remaining interests are sold, the subdivider may be reimbursed directly from funds paid by the purchasers.

Unless all of the start-up fees are paid in one lump sum up front by the subdivider, it will be necessary for the subdivider to post a security along with applicable escrow instructions in favor of the homeowners association to

assure the obligation to pay the fees at the end of the date certain for all unsold lots or units covered by the public report. Alternatively, the subdivider may include in the escrow instructions a provision that before the first close of escrow proof has been provided to the escrow holder that the subdivider has deposited to the account of the association the entire amount of funds to be collected and shall be entitled to reimbursement of the start-up funds paid by each purchaser at the close of each escrow.

Question 38A — C

INFORMATION ON FUTURE PHASES

RE 623s are required for each phase of a multiple phase project.

A map of the entire project with proposed future phases clearly delineated must be submitted if Exhibit 27 does not show proposed future phases. The map of the entire project with proposed future phases, should indicate the proposed phasing schedule, the intended sequence of annexation, the proposed number of subdivision interests in each phase, the proposed common facilities within each phase, the approximate built-out schedule, and, if known, the tract number of each phase.

■ **Definition:**

The proposed HOA budget for each phase to be annexed within the next three years submitted on RE 623; a map of the entire project; and information pertinent to an existing homeowners association.

■ **Reference:**

Real Estate Law: 11018.5(d)/(e)

Comm. Regulation: 2792.1 and 2792.27

■ **Why required:**

The Department will determine the reasonableness of the proposed project configuration; the access to annexable land; the adequacy of the proposed project budget and the financial arrangements for completion of common facilities located in subsequent phases but included in the original offering; the integrity of individual phases; and, if applicable, the financial viability of existing phases.

It is necessary to review the overall proposed project; budgets of future phases, map of total project, and information pertinent to an existing homeowners association to ensure that the proposed project will comply with Real Estate Law; that assessments are equitably distributed and adequate for the overall project; that there is reasonable access to each phase, that the individual phases could "stand alone" if annexation did not occur; and that common area amenities will not be overburdened when all phases have been annexed. It is also necessary to review the financial status of an existing homeowners association.

■ **Elements for review:**

- An accurate and equitable budget for each phase
- The possibility of common facilities being overburdened
- Map or maps must cover entire project as proposed
- Adequacy of common facilities for their designated use
- Access to facilities within project
- Adequacy of budget of existing HOA, if any
- Adequacy of reserve funds
- Delinquency rate in existing HOA, if any
- Subdivider assessment delinquency, if any.

■ **Items for disclosure:**

- Proposed annexation(s)

- Financially secured common facilities
- Built-out project projection
- Overall scope of project
- Phased budgets, if applicable
- Number of phases and proposed schedule
- Interim and built-out-budget, as applicable
- Any increases in assessments or increased use of common facilities
- Adequacy of existing budget, as applicable
- Adequacy of reserve funds
- Assessment delinquency, if any.

■ **Item is unacceptable if:**

- RE 623s are not properly completed
- The assessment plan is inequitable or inadequate for anticipated expenditures
- Common area amenities would clearly be overburdened
- Phasing plan creates access problems within the overall project.

☞ If the subdivider is delinquent in the payment of assessments, the final public report will ordinarily not be issued until said delinquencies are cured or a definitive plan is agreed to which assures curing of the delinquency.

Annexation Assessments – The approved budgets for the various phases in a phased project (or for the various maps in a multiple-map project) assume that phases will be annexed in sequential order and that assessments in those phases will commence in sequential order; i.e., phase two will be annexed and phase two assessments will commence prior to the annexation of phase three and prior to the commencement of assessments in phase three, etc.

If the assessments for the various phases do not commence in sequence, the budgets would probably not be adequate (unless all the phases in the project are identical) and that would constitute a material change in the offering. The change in the phasing plan would also be a change in the offering. All affected public reports would require amendment; the budgets for all affected phases would need to be recalculated by the subdivider or his/her budget preparer and the new budgets would need to be reviewed by DRE's Budget Reviewers.

A material change in the offering may also result if promised common facilities or necessary infrastructure such as roads were not completed or conveyed to the HOA because of not annexing sequentially.

Issues such as completion arrangements, conveyance of easements for access along with association budgetary concerns must be addressed.

Question 39A

ESCROW INSTRUCTIONS

Required Document

■ **Definition:**

Escrow instructions specify the conditions which must be satisfied before the property sale transaction can be finalized. Purchaser's escrow instructions include those obligations which must be fulfilled before possession of title can be taken, and detail the conditions the seller must satisfy before funds are released from impound. Escrow instructions should also include safeguards guaranteeing the return of funds to non-defaulting buyers within a reasonable amount of time if escrows are not closed.

■ **Reference:**

Real Estate Law: 11013.2 or 11013.4, 11018.5(a) (2) (B)/(C), 11018.5(c), 11018.12

Comm. Regulation: *2790.2,* 2792 and 2792.1

Civil Code: *2995*

■ **Why required:**

Escrow is a mechanism that protects both buyers and seller. DRE reviews the escrow instructions to ensure that there are no potentially harmful provisions in them. The law specifies a number of required features that need to be verified by the Deputy.

■ **Elements for review:**

- Compliance with 11018.5(a)(2), as applicable
- Purchase money handling
- Return of funds to buyer after reasonable time if escrow cannot close
- Liquidated damages provisions, if any, in compliance with Civil Code and Regulation 2791
- Concurrent closing of escrows, if relevant; Regulation 2792.9(a)(1) or presale requirements
- Conditions for close of escrow if Reg. 2791.1 applied
- Subordination, if applicable
- Compliance with initial working capital fund/start-up fund contribution requirements, if applicable
- Description of property to be conveyed
- Sample set signed by both applicant and escrow holder certifying that the document is a sample of the instructions to be used
- Lien-free conveyance (bonds, liens, etc.)
- Future mechanic lien endorsement requirement, if applicable
- Seller instructions to escrow depository relative to buyer's default consistent with Regulation 2791(c)(4).
- Specification of the requirements of Section 11018.12 of the Business and Professions Code and Regulation 2790.2 (Conditional Public Report), if applicable

■ **Item for disclosure:**

- Time frame for return of funds to non-defaulting buyers if escrow cannot close
- Subdivider's financial interest in escrow holder, if 5% or greater (Section 2995)
- Presale requirements
- Completion arrangement assurances [Section 11018.5(a)(2)]
- Conditional public report provisions (Section 11018.12 and Regulation 2790.2)

  Future mechanic liens endorsement, if applicable

■ **Item is unacceptable if:**

- It does not include all pertinent provisions
- It does not bear signatures of applicant and escrow holder. Generic "signature pages" should not be used.

☞ In addition to the buyer and seller escrow instructions there may be separate, irrevocable escrow instructions on certain points. Some examples of separate instructions are RE 613, 621, 643, and 643E.

See also items 11, 14, 20, 32, 33, 37, 38, and 41 relative to escrow instruction provisions. Also see Section IX, item D6.

Question 40B

CONVEYANCE OF COMMON AREA

A grant deed conveying lien-free title to the homeowners' association is required if the common area will be conveyed to the homeowners association (HOA).

A trust agreement is required if the common area is proposed to be conveyed to a trust. Trust agreements will ordinarily be reviewed for sufficiency by DRE legal section.

Executed irrevocable escrow instructions are required if conveyance of common area to the HOA is not by means of a grant deed recorded prior to issuance of the final public report. Such instructions are also required if title is held in trust until conveyance to the HOA.

■ Definition:

This assures that the homeowners' association will have title to the common area and that there are no encumbrances upon that property at the time of conveyance to the HOA.

■ Reference:

Real Estate Law: *11013.2,* 11018.5(d)/(e)

Comm. Regulation: 2792.1 and 2792.15

■ Why required:

If the subdivider is not going to convey undivided fractional interests in the common area to purchasers, the common area must be conveyed to the homeowners association. When such an arrangement is elected, DRE reviews the grant deed or other documentation such as escrow instructions to make sure the proper areas are covered, that there are no liens, etc. This is to assure that the common area is conveyed to the HOA free and clear of existing monetary encumbrances and potential mechanics' lien claims..

The purpose of a trust agreement (if conveyance of title to HOA is to occur later) is to secure ownership of common areas and facilities included in the offering, thereby insuring their availability for use by purchasers in the project.

■ Elements for review:

- The following pertain to the grant deed:
  - Grant deed must be executed by subdivider and signature must be notarized.
  - Grantee must be the homeowners association and grantor must be the owner.
  - Grant deed must cover entire common area in the filing.
  - Grant deed must be accompanied by executed irrevocable escrow instructions that provides for the conveyance of the common area to HOA free and clear of all liens and encumbrances prior to or concurrent with conveyance of title of first subdivision interest to a purchaser.
- The following pertain to a trust agreement:
  - Parties in trust are correct
  - Condition of trust agreement
  - Subdivider must be limited from further encumbering
  - Time for conveyance.
- The following pertain to escrow instructions:
  - Must provide for recordation of deed to the HOA prior to, or concurrent with, conveyance of title to first subdivision interest to a purchaser

- Must be irrevocable
- Must provide for lien-free conveyance to HOA prior to, or concurrent with, conveyance of title to first subdivision interest to a purchaser
- Must provide for issuance of a policy of title insurance to the HOA showing title free and clear of all liens and encumbrances, and including an endorsement against future liens if the statutory period for mechanics' and materialmens' liens has not expired. The homeowner association policy shall be in an amount of no less than the cost of the common area improvements.
- Must contain original signature of subdivider or attorney-in-fact and escrow holder.

■ **Items for disclosures:**

- Common area lot(s)/unit(s)
- Deferred conveyance, as applicable
- Trust arrangement, if any.

■ **Item is unacceptable if:**

- There is no provision for a conveyance of the common area free and clear of all liens and encumbrances prior to or concurrent with conveyance of title of first subdivision interest to a purchaser.
- If grant deed, trust agreement and escrow instructions do not include all necessary provisions
- Legal description is inaccurate
- If the grant deed is not executed by subdivider and notarized.

Question 41

COMPLIANCE WITH REGULATION 2792.9 — ASSESSMENT GUARANTEES

Escrow instructions providing for simultaneous 80% closure (or leased if that is the marketing plan) are required when subdivider is complying with Regulation 2792.9(a)(1).

RE 643 (Assessment Security Agreement & Instructions to Escrow Depository) and a copy of the security device (RE 643J surety bond; RE 643I letter of credit; or RE 688A set-aside letter) are required when complying with Regulation 2792.9(a)(2). Proposed alternative plan is required when complying with Regulation 2792.9(a)(3).

■ **Definition:**

A means of guaranteeing subdivider's share of common area assessments for maintenance and operational expenses.

■ **Reference:**

Real Estate Law: 11018.5(e)

Comm. Regulation: 2792.9 and 2792.16

■ **Why required:**

As a project begins to sell, the first few owners would have to bear all the expenses of maintaining the common areas unless the subdivider paid the assessments on the unsold units/lots. These are arrangements to secure the subdivider's assessment obligation on unsold units/lots until 80% of the lots/units which are covered by the final subdivision public report have been conveyed or leased. After that time, the security may be released if the subdivider is current in payment of assessments, but the obligation to pay assessments on the unsold units/lots remains.

■ **Elements for review:**

- Regulation 2792.9(a)(1)

- Escrow instructions must indicate that 80% of the escrows close (or be leased if that is the marketing plan) simultaneously before any are closed.

- Regulation 2792.9(a)(2)
  - RE 643 executed by correct parties
  - Bond must show HOA as obligee and party holding title to the subdivision (usually subdivider) as obligor
  - Security device may only be released upon conveyance of 80% of the units/lots covered by the final public report and receipt of a statement from the HOA that assessments have been paid and obligor is current in payment.
  - Bond may not be released simply because the bonding company gives a notice of cancellation to escrow holder
  - Security device must be in the amount equal to six (6) months regular assessments applicable to the lots/units to be covered by the final subdivision public report.
- Regulation 2792.9(a)(3)
  - Plan must provide protection equivalent to that in (a)(1) and (a)(2).

■ **Item for disclosure:**

- No escrow will close until 80% of the lots/units have been sold or leased and are ready to close/lease simultaneously, if applicable
- The fact that financial security is posted, if applicable
- Nature of the plan.

■ **Item is unacceptable if:**

- It does not comply with Regulation 2792.9
- The plan is insufficient to assure the fulfillment of the subdivider's obligation to pay assessments
  - Escrow instructions do not require 80% of the escrows close simultaneously before any are closed/leased, if applicable.

Question 42 *[Master File Item]*

RE 616 AND 648

RE 616B and 616C are required only if management documents have been approved under the provisions of the DRE master management document (MMD) system. MMD's cannot be approved for mixed residential/commercial projects, or master planned developments.

RE 648 is required only if master management documents (MMDs) are not being submitted.

■ **Definition:**

RE 616B and 616C are the Declaration of Approved MMDs and the DRE approval letter.

RE 648 is a regulation checklist to assist in the review of management documents which have not been pre-approved.

■ **Reference:**

Real Estate Law: 11018.5(e)

Comm. Regulation: NA

■ **Why required:**

RE 616B and 616C verify that the CC&Rs submitted are actually approved as MMDs.

RE 648 serves two functions. In filling it out the applicant checks whether certain required features of the management documents are present. This encourages more complete and correct CC&Rs, etc.

The Deputy uses the RE 648 to double-check the vital aspects of the management documents without having to "wade through" the entire package more than one time.

■ **Elements for review:**

- RE 616B must bear the original signature of the person who prepared the management documents
- MMD Approval Number must be on current approved list
- Project type must be same as MMD project type
- Items on RE 648 must correspond to document and page location in the management documents.

■ **Items for disclosure:**

NA

■ **Item is unacceptable if:**

- MMD approval has expired
- RE 648 is not completely or accurately filled-in.

☞ RE 616B and 616C are required to properly submit pre-approved master management documents (MMDs). In addition to these forms, the MMDs themselves are reviewed for compliance with MMD filing requirements.

Elements for Review are:

- MMDs must apply to the project for which they are submitted, e.g., MMDs approved for use on a single phase project cannot be used with an application for a multi-phased project
- MMDs cannot be used for a mixed residential/commercial projects, or a master planned development.
- MMDs must be current and must reflect law and/or regulation changes (MMDs expire upon notification by the DRE — usually following substantial law or regulation changes).

Question 44 *[Master File Item]*

PROPOSED ARTICLES OF INCORPORATION OR ASSOCIATION

Required when homeowners association is to be incorporated or when articles of association are used.

■ **Definition:**

Articles of Incorporation, when filed in the Office of the Secretary of State, give existence to a corporation.

Articles of Association: An agreement between natural persons which establishes an unincorporated association.

■ **Reference:**

Real Estate Law: 11018.5(d)/(e),11018(h)

Corporations Code: 7130

Civil Code: 1363, 1363.5

Comm. Regulation: 2792.1, 2792.8, 2792.15 through 2792.21, 2792.23, 2792,24, 2792.26 through 2792.28

■ **Why required:**

The articles of incorporation or association serve to establish the homeowners association as the legal entity to which the CC&Rs and bylaws, etc., will apply. The articles must be reviewed to insure that they are adequate for this purpose.

■ **Elements for review:**

- Articles of Incorporation – See Corporations Code, Section 7130 for required provisions as well as Civil Code 1363. These include:
  - Corporation's name
  - Purpose statement that:

  "This corporation is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law. The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under such law, other than credit union business, for which a corporation may be organized under such law."

  - Name and address of initial agent for service of process.
  - Compliance with Civil Code Section 1363.5 for identification of the association.
  - Amendment voting requirements — The following sample text is acceptable to comply with Regulation 2792.24:

    Amendment shall require the vote or written assent of at least a bare majority of the governing body and the vote or written assent of at least a bare majority of the voting power of the association, which shall include at least a bare majority of the votes of members other than the subdivider.

    Notwithstanding the above provisions, the percentage of voting power required to amend a specific clause in the articles shall not be less than the prescribed percentage of votes necessary to take action under that clause (or under the law).
- Articles of Association — There are no requirements or mandatory provisions for articles; however, if used, there should be amendment provisions that comply with Regulation 2792.24. Reference: Civil Code 1363
  - ☞ The provision for amendment of the articles of incorporation or articles of association may be set forth in the bylaws, but it must be a separate provision from that for amending the bylaws.

■ **Items for disclosures:**

- Whether the HOA is incorporated or not.

■ **Item is unacceptable if:**

- Provisions do not comply with Regulation 2792.24 or with the provisions of Nonprofit Mutual Benefit Corporation Law and Civil Code.
  - ☞ If using articles of incorporation, an endorsed copy of the filed articles must be submitted before the final public report will be issued.

Question 45 *[Master File Item]*

PROPOSED BYLAWS

Required in common interest applications when bylaws are used.

■ **Definition:**

The bylaws set forth the basic method of running the homeowners' association, providing for meetings,

voting, officers and reports.

■ **Reference:**

Real Estate Law: *11018.5(d)/(e),*11018(h)

Civil Code: *Title 6 Common Interest Developments – Davis Stirling Common Interest Development Act (1350 et seq.)*

Corporations Code: *Nonprofit Mutual Benefit Corporation Law (7110 et seq.)*

Comm. Regulation: 2792.1, 2792.8, 2792.15 through 2792.21, 2792.23, 2792.24, 2792.26 through 2792.28, 2792.32, 2792.33

■ **Why required:**

If used, the bylaws are the rules for the operation of the homeowners' association. Portions of the Corporations and Civil Code along with the Regulations go into great detail on the parliamentary arrangements required for reasonable HOA rules. The intention behind these statutes and Regulations is to ensure that the HOA acquires proper control over its own assets and that it can function in a democratic and effective manner for the good of all owners.

■ **Elements for review:**

- ***Consistency*** with CC&Rs and articles of incorporation or articles of association
- ***Name and Location*** – Set forth the name and location of the association including a principal place of business
- ***Definitions*** – A set of definitions is needed to understand how certain terms in the management documents are used. They will differ, depending upon whether the project is a condominium, planned development, or another type of subdivision. Often, the definitions are part of the CC&Rs. A provision in the bylaws may simply state that the definitions in the CC&Rs apply also to the bylaws.
- ***Meetings of the Association*** – Provisions covering the meetings of the association should provide for organizational, regular and special meetings, pursuant to Regulation 2792.17. There must be procedures for giving notice of meetings and for voting and quorum requirements to ensure that all members have an opportunity to be present and heard. Some of these requirements are part of the Corporations Code or part of the Civil Code.
- ***Election of the Board of Directors*** – Normally, the members of the association will elect a board of directors to handle the day-to-day affairs of the association. Provisions regarding election of directors are set forth in Regulation 2792.19 and the Civil Code. The size of the board should be small enough to enable the directors to work easily with each other.
- ***Meetings of the Board*** – Pursuant to Regulation 2792.20, the bylaws should provide for the calling of regular and special board meetings. Included should be provisions for open or executive sessions of the board and the giving of notice of such meetings.
- ***Powers, Duties and Limitations of the Board*** – Although not meant to be an all-inclusive list, Regulation 2792.21 indicates what kinds of powers the governing body should have and stipulates which actions shall ordinarily be prohibited. Only the limitations of the board's powers, not the granting of powers are listed below, but the bylaws should also mention the power of the governing body to enter into contracts, levy special assessments, etc., all as per Regulation 2792.21(a), plus mentioning the limitations as per Regulation 2792.21(b).
- ***Officers*** – Among the powers of the board is the right to appoint officers. The bylaws should set forth specific provisions defining each office, and its functions including provisions for election and replacement. No regulations exist to guide the subdivider. However, there are usually four officers: the president, vice-president, secretary and chief financial officer.

  The president will normally supervise the affairs of the association, including presiding over board meetings and participating in all committee meetings.

The vice-president performs all the duties of the president should the president be absent or disabled.

The secretary keeps minutes of all meetings of directors and keeps minutes of all meetings of members and gives notice of all meetings as required by the bylaws.

The chief financial officer keeps complete and correct accounts of the business transactions of the association. The chief financial officer deposits all monies collected by the association with depositories designated by the board of directors and disburses the funds as ordered by the board of directors and renders account upon request.

- ***Budgets and Financial Statements*** – The bylaws should ordinarily contain provisions covering the preparation of budgets and financial statements, provide for their distribution to all members of the association, pursuant to Regulation 2792.8(a)(12) and not in conflict with Civil Code Section 1365, and provide for their review as per Civil Code Section 1365.5:
- ***Inspection of Records*** – The bylaws should contain provisions of Regulation 2792.23 and not conflict with Civil Code 1365.2, which provides that members of the association and directors of the board must be allowed to inspect and copy the association's records, minutes and books. This allows the buyer to protect his interests by letting him check on the activities of the association and its various committees:
- ***Discipline of Members*** – In any case where a member of the association is subject to the imposition of discipline following a violation of the governing instruments (for example, nonpayment of assessments, destruction of common area, violation of use restrictions), notice of the violation and a hearing on any charge is required prior to the imposition of discipline. The length of any suspension or the amount of any fine should be reasonable. The procedural requirements are mandated by Corporation Code Section 7341, and Regulation 2792.26 imposes certain limitations as to discipline.
- ***Amendment*** – The amendment voting requirement should be as per Regulation 2792.24.

Question 46

COVENANTS, CONDITIONS AND RESTRICTIONS PRESENTLY RECORDED.

Submittal of any covenant running with the land is required, whether it is termed an agreement, a restriction, etc.

■ **Definition:**

This is a compilation of all qualifications and limitations on the use of the property, binding the present owner, the subdivider, and future owners.

■ **Reference:**

Real Estate Law: NA

Comm. Regulation: 2792

■ **Why required:**

This document is required because it may provide for restrictions on the use of the land that may preclude development as envisioned by the subdivider. Or it may include restrictions that should be amended or deleted prior to sale. Or it may contain provisions which obligate purchasers to perform certain tasks at a later date (e.g., a Deferred Improvement Agreement). These are items which should be reviewed early in the approval process.

■ **Elements for review:**

- Age restrictions
- Right of first refusal
- Unusual use restrictions
- Annexation provisions (if applicable)

- Correct legal description.

■ **Items for disclosure:**

- Unusual restrictions
- Potential costs to purchaser.

■ **Item is Unacceptable If:**

NA

☞ If the existing CC&Rs do not allow the property to be used for the purposes described in the application, the CC&Rs must be removed or a title insurance endorsement must be obtained, which protects the potential purchaser against potential losses which said purchaser may incur should the CC&Rs be enforced.

Question 47 *[Master File Item]*

PROPOSED CC&RS

Required for all common interest subdivisions and any standard subdivisions which will be subject to CC&Rs. Recorded CC&R's must be submitted, after DRE review and approval, prior to issuance of a final public report.

■ **Definition:**

The CC&Rs set forth the basic rules governing the rights and obligations of present and future owners of the covered property. Once recorded in the county recorder's office, they are binding on homeowners until changed according to prescribed amendment procedures.

■ **Reference:**

Real Estate Law: 11010(b)(4)/(8), 11018(h) and 11018.5

Civil Code: Title 6 Common Interest Developments – Davis Stirling Common Interest Development Act (1350 et seq.)

Corporations Code: Nonprofit Mutual Benefit Corporation Law (7110 et seq.)

Comm. Regulation: 2792, 2792.1, 2792.4, 2792.8, 2792.15–2792.21, 2792.23, 2792.24, 2792.26–2792.28, and 2792.32, 2792.33

■ **Why required:**

CC&Rs, by their inherent binding power on the purchaser, have a great effect on suitability and fair dealing aspects of the subdivision. Real estate law has rather specific affirmative standards for common interest subdivision CC&Rs.

☞ The governing provisions of an incorporated common interest subdivision homeowners' association are often included in three complementing documents: articles of incorporation, declaration of covenants, conditions and restrictions (CC&Rs) and bylaws.

If the homeowners' association is not incorporated, articles of association may be substituted for the articles of incorporation, listed in the previous paragraph. An unincorporated homeowners' association may be created without articles of association, provided adequate language is included in the CC&Rs and/or bylaws. An unincorporated homeowners' association may also be created uniquely via CC&Rs, provided all necessary provisions, are included in that one document.

If a homeowners' association is incorporated, or if an unincorporated homeowners' association is created using more than just CC&Rs, care must be taken to make all documents consistent. If like provisions are contained in two (or three) of the documents, they may not be dissimilar, e.g., if the CC&R's makes reference to a three member governing body and the bylaws specify the number of governing body members, the number specified must also be three.

Any and all recognized inconsistencies should be corrected, even though one of the documents set forth the order of precedence in cases of inconsistency.

- **Elements for review:**

Table of Contents – A detailed table of contents should be included, but not required, in the front of the CC&Rs listing the significant provisions by page number.

The following are suggested areas to be included in the CC&Rs, but are not intended to be all-inclusive.

I. The Recitals and Creation of Equitable Servitudes – The recitals should contain the identity of the declarant, as the owner of the property in fee, including any successors and assigns. The property should be identified by its legal description. In the case of an initial phase of a multi-phased project, normally only the first phase is covered by the CC&Rs. If there is a plan of annexation, the property to be annexed should be specifically described.

The declaration must contain language sufficient to create equitable servitudes and the declaration must be incorporated into the grant deeds by reference.

The declaration must contain language designed to make the restriction effective. Applicants should consult their lawyers in this regard.

II. Definitions – Definitions are included to help buyers understand the management documents. They are also included to clearly define terms and specify maintenance and administrative obligations and powers given to, or retained by, an owner, as opposed to the powers of the association, board, committees, etc.

Definitions may be stated in the restrictions or in the bylaws, but need not be repeated in both except for a cross-reference to the other document. It is preferred to include the definitions in the CC&Rs since this document is recorded, whereas the bylaws normally are not recorded.

The terms to be defined will vary, depending upon whether the subdivision is a condominium, planned development, or other type of project. Be sure to check that the definitions, of such terms as "unit," "exclusive use right", "restricted common area," etc., are consistent with the map, the condo plan and the grant deed, as applicable. Certain terms such as "condominium" and "planned development" are specifically defined in Civil Code Sections 783 and 1351. Other important terms to be defined include: "regular and special assessments," "association," "declarant," "common area," "mortgagee." In a multi-phase development, both the entire project and the individual phases should be defined. Other project-pertinent terms should also be included.

III. Rights of Ownership and Easements – This section should begin with a description of the project, including its size and type of development. All necessary easements should be expressly granted to each owner, including the declarant as to his/her unsold units. An easement is a legal right to use property in a certain way. Easements include easement rights for ingress and egress to and from the common area, exclusive easement rights, and easement rights for the use and maintenance of utilities, etc.

The subdivider may wish to reserve to him/herself, easements over the property to complete the construction of the project. These must be of limited duration pursuant to Regulation 2792.15(b). Subdivider's easements should normally be limited to three years for a single-phase or five years for a multi-phase project. It is also advisable to specifically define the maintenance duties and obligations of the Association and the owners.

IV. Association Membership – In any type of common interest subdivision, it is necessary that membership be inseparable from the land title or the leasehold. No DRE Regulation covers this matter, but failure to include such a provision would be an "unreasonable arrangement" under Business and Professions Code Section 11018.5.

The declaration should include a provision similar to:

> "Every owner of an interest in the subdivision shall be a member of the Association. Membership shall be appurtenant to and may not be separated from the ownership of the interest. Any transfer of title to the interest shall automatically transfer the appurtenant membership in the Association to the new owner."

Contract vendees shall be members of the association and the vendor may be held secondarily liable for compliance with the declaration.

V. Membership Voting Rights – Class Structure

Members' voting rights should be set forth in the CC&Rs (Regulation 2792.18), but need not be repeated in the bylaws except for a cross-reference to the other document. Typically, either a one- or two-class voting structure is utilized. A one-class structure is one vote/one unit; however, one vote per unit, no matter how many persons own the unit. A two-class structure means that the votes have different "strengths." While the unit owners have "Class A" votes at the usual one vote/one unit strength, the subdivider, for a limited period of time, may have "Class B" votes with a strength of three votes/one unit.

The advantage of using a one-class voting structure is its simplicity and ease of use. The advantage of a two-class system is that it allows the subdivider to maintain control over association actions for a longer period of time.

Either one- or two-class voting structures may be used, but only one of the two types may be included in the management documents. (For planned developments, the word "lot" should be used instead of the word "unit.") Refer to Regulations 2792.18 et seq. and 2792.32.

☞ *Special Voting Procedures* – Regulation 2792.18(c) sets forth voting procedures for those matters which specifically require the vote of members other than the declarant. This specific voting requirement is found in Regulations 2792.4, 2792.16 (d)/(e), 2792.21(b), 2792.24 and 2792.27, which cover those areas considered most important to protect the rights of the purchaser. The effect of Regulation 2792.18(c) is to give both the subdivider and future owners an equal chance to object to a proposed action by requiring approval of actions by both groups. Since the declaration is the controlling instrument, such provisions should be included therein so that a single clause can be made applicable also to the other management documents, if any.

Language must be drafted using the provisions of the Regulations to set forth voting requirements for those actions which require a vote of the members other than the subdivider.

With the exception of the provision to enforce bonded obligations, no regulation which requires the approval of a prescribed majority of the voting power of members of the association, other than the subdivider, for action to be taken by the association, is intended to preclude the subdivider from casting votes attributable to subdivision interests which (s)he owns. Refer to Regulation 2792.18(c) for applicable language.

VI. Assessments – Regulation 2792.8(a)(4)/(5)/(6) requires reasonable arrangements for calculating and collecting regular and special assessments to run the association. Regular assessments are those levied to pay for the day-to-day operating expenses of the association. Special assessments are those levied for unusual, nonrecurring expenses such as capital improvements, repair and reconstruction or the discipline of a member of the association.

Fines and penalties as discipline for a member, are *not* "special assessments," which subject an owner to sale of his/her unit under Section 1367 of the Civil Code.

- Proportion of assessments payable by each owner: Regulation 2792.16(a)/(b)/(e)(2).

  ☞ Unequal assessments may be required if the benefits from common services vary substantially. In such a case, it would be desirable to specify those portions of assessments which are to be levied unequally and those to be levied equally.

  There are two exceptions to the requirement that assessments be levied uniformly. Reconstruction assessments are treated differently because those who own a bigger unit should pay a larger percentage of the cost of reconstructing the building than one who owns a smaller unit. And, remedial assessments are levied only on the person who has violated the governing instruments, not on all owners.

- Responsibility of the declarant to pay assessments Regulation 2792.16(c).

  ☞ If the project is being built in phases, the declaration may contain a provision which exempts the

declarant and any other owner of an interest which does not contain a structural improvement from the payment of regular assessments to the extent they are meant to defray expenses and create reserves for the existence and use of structural improvements. This exemption from the payment of assessments attributed to dwelling units shall be in effect only until the earliest of the following events:

a) A notice of completion for the structural improvements has been recorded.

b) Occupation or use of the dwelling unit.

c) Completion of all elements of the residential structures which the Association is obliged to maintain.

The subdivider and any other owner of a subdivision interest may also be exempted by the governing instruments from the payment of that portion of any assessment which is for the purpose of defraying expenses and reserves directly attributable to the existence and use of a common facility that is not complete at the time assessments commence. Any exemption from the payment of assessments attributed to common facilities shall be in effect only until the earlier of the following events.

a) A notice of completion of the common facility has been recorded.

b) The common facility has been placed into use.

When assessments begin - Regulation 2792.16(f)(1).

☞ In a multi-phased development, the declarant may wish to provide for assessments to begin earlier than on the first day of the month following the first sale of a unit in that phase closing or the first sale in the total project. (See SPRAG "Item 38A-C" for more information.)

Consult the Regulation if a subsidy plan will be used.

- Vesting of voting rights - Regulation 2792.16(f)(2).
- Limitations on assessments; Section 1366(b):
- Provisions regarding subordination of assessment liens - Section 2792.16(g)(1), (2) and (3).

This provision aids owners in obtaining mortgages by allowing first mortgagees to have priority over the association in collecting debts. Note, that this special treatment is given only to *first* mortgagees. This is intended to limit the number of persons who could collect the debtor's assets ahead of the association.

☞ Extinguishment of prior assessment liens as the result of a deed in lieu of foreclosure is *not* reasonable and will not be approved. A deed in lieu of foreclosure does not notice the association of the impending transfer, thus deprives the association of the opportunity to collect arrearages. See Regulation 2792.16(g)(2).

- Enforcement of Assessment Liens — The Restrictions should also contain provisions for enforcement of assessments by allowing the homeowners association to place a lien upon the purchaser's subdivision interest. Provisions for creating a lien, in a common interest subdivision, are set forth in Civil Code Section 1367.

  Provisions for foreclosure of the lien are set forth in Civil Code Sections 1367, 2924, 2924(b) and 2924(c). These procedures should be part of the restrictions.

  The restrictions may contain provisions for the payment of late charges or the imposition of interest on delinquent assessments after proper notice. Refer to Civil Code Section 1366.

  Finally, the document should provide for payment of past due assessments by the homeowner and for issuance by the association of a certificate indicating that payment of assessments is current. Such a certificate is frequently required upon the sale or mortgaging of the purchaser's subdivision interest. (See subsections (b) and (c) of Civil Code Section 1368.)

VII. Use Restrictions – There exist few Regulations prescribing restrictions which limit the purchaser's use of his/her subdivision interest.

The purchaser's rights are protected by Regulation 2792.26(a) which forbids any power to cause a forfeiture or an abridgement of an owner's right to the full use and enjoyment of his/her interest. The subdivider should make sure that any use restrictions are reasonable and tailored to the development. In addition, the following policies should be observed:

a. If the project is a conversion to a "senior citizen housing development", any provision imposing age restrictions should expressly exempt existing tenants who elect to purchase the unit in which they live. Such exemption is commonly referred to as a "grandfather" clause. (See Civil Code Section 51.3 regarding "senior citizen" housing requirements and the Fair Housing Amendments Act of 1988, as amended per the enactment of the Housing for Older Persons Act of 1995..)

b. The only limitation upon the display of "for sale" signs is that they must be of "reasonable and customary dimensions" pursuant to Civil Code Section 712.

c. No provision should cause a forfeiture or abridgement of an owner's use and enjoyment of his own subdivision interest, Regulation 2792.26(a).

d. All leases of subdivision interests should be made expressly subject to the restrictions. The lessor should retain the power to evict the tenant upon the tenant's breach of the restrictions.

VIII. Architectural Control – In order to regulate the appearance of the common area and the purchaser's lot or unit, the subdivider may wish to create an architectural control or review committee. This allows both owners and subdivider to have a voice about the future appearance of the subdivision. The creation of this committee is optional, and its functions may be left to the board of directors.

The declaration can be simplified by designating the governing body as the architectural control committee. If the governing body is elected pursuant to Regulation 2792.19(c)(1), Regulation 2792.28 (Architectural and Design Control) should also be satisfied.

☞ If an architectural control committee is created, the declaration should set forth procedures for holding meetings, submitting plans, time limits for approval, adequate notice and hearing for the proposal, and disciplinary power against an owner for violation of the committee's rules and procedures.

IX. Destruction and Eminent Domain — These sections must be tailored to the particular needs of the project. Include provisions specifying the types and limits of insurance. Insurance provisions should include coverage of public liability, fire, worker's compensation, fidelity and extended coverage. Policy limits should match replacement value. The right of the individual should be limited by subordination of its rights in favor of the association. Notwithstanding any insurance carried by the association, the individual should remain liable for intentional or willful actions.

Provisions covering the rebuilding of the structural common area should give the association the option to rebuild or not rebuild and should provide for the distribution of insurance proceeds. If insurance proceeds are not adequate to cover the full cost of repair, provisions should include the levying of reconstruction assessments.

If condemnation of a portion of the common area occurs, the restrictions should provide for an apportionment of the award.

X. Limitation on Partition and Severance – Prohibitions upon severing the separately owned interest from the common interest portion of the subdivision should be included; see Regulation 2792.8(a) (19).

"The separately owned interest in the subdivision is inseparable from the common interest. No owner shall make a conveyance of less than his entire interest in the subdivision, and any such conveyance shall be void. Nothing herein shall affect the right of an owner to create a tenancy in common in the entire ownership interest."

Regulation 2792.8(a)(20) requires provisions for reasonable conditions upon which a common interest subdivision may be partitioned. Normally the right to partition a condominium is suspended, but Civil

Code Section 1359 establishes conditions under which partition is allowed.

XI. Annexation – Annexation is a completely optional provision, to be used only if the subdivider can foresee other land being added to this project; Regulation 2792.27. If a detailed plan of phased development has been submitted to DRE, the restrictions may include procedures for unilateral annexation by the subdivider.

XII. Mortgagee Protection – Lenders frequently require that certain protections be built into the restrictions. The proposed lenders should be consulted relative to their particular requirements. If financing will be subject to FNMA or FHLMC provisions, pertinent clauses in the restrictions should be drafted in accordance with the latest rules of the subject agency.

XIII. Enforcement of Bonded Obligations – If the developer is bonding or using some other financial guarantee to ensure completion of the project, pursuant to Business and Professions Code Section 11018.5(a)(2)(A)/(E), provisions should be included to protect the purchasers by giving the homeowners' association the power to enforce the bond if the subdivider fails to complete the project; Regulation 2792.4.

XIV. General Provisions

a. Term - Normally a limit is placed on the length of time the restrictions will bind the land. This provides necessary flexibility to cope with changes in the neighborhood and life-style over the years. For example, restrictions may remain in full force and effect for the next 50 years, with provisions for automatic extensions of this time for ten year periods unless the association members vote not to extend.

b. Conflicts - While it is hoped that careful drafting will prevent any inconsistencies in the articles, bylaws and restrictions, conflicts may exist. It is suggested that a provision be included indicating which documents shall control in the event of any inconsistency.

c. Right of First Refusal or other Restraint on Alienation - The Department requires that any provision in the declaration which restricts the right of an owner to sell or lease his subdivision interest must be based upon reasonable, uniform, objective standards. They may not be based upon the race, color, religion, sex, martial status, national origin or ancestry of a vendee or lessee. Any Right of First Refusal must contain a reasonable time frame for exercise of the right.

d. Certain cities and counties have specific requirements for provisions to be included in the restrictions filed on the project. The city or county where the project is located should be consulted relative to any such impositions. Local requirements may not, however, conflict with Subdivision Laws or Regulations and may not exceed the usual "police" powers of the local jurisdiction and the local jurisdiction should not be conferred authority equal to that of the Association.

XV. Amendment Provisions – Amendment provisions are needed so that restrictions may be amended to conform to changes in law and/or circumstances. Regulation 2792.24 establishes fair voting procedures which insure that the homeowners have power to amend or not amend which is equal to that of the subdivider, despite the fact that the subdivider may have more votes.

☞ It might be advisable to include a statement reminding owners of the limitations of Business and Professions Code Section 11018.7, which requires DRE consent of "material amendments" while the declarant or his or her successor in interest holds or directly controls as many as 25% of the votes that may be cast to effect the change.

Questions 48A & B

SUBORDINATION

Required when unsold lots/units will be subject to monetary encumbrances recorded prior to the CC&Rs.

■ Definition:

Subordination is an agreement by the holder of an encumbrance against real property to permit his/her claim to take an inferior position to later encumbrances against that property; in this instance the later encumbrance is the CC&Rs.

The various methods by which subordination may be demonstrated are:

A. A copy of a title report, covering all lots/units in the subdivision, showing the deed(s) of trust subordinate to the CC&Rs by virtue of the recordation of (a) subordination agreement(s).

B. Executed and recorded subordination agreement(s), bearing evidence of recordation.

C. Recorded declaration of restrictions including subordination signed by the beneficiary of each encumbrance recorded prior to the CC&Rs.

D. Copy of signed subordination agreement(s) to be recorded and executed irrevocable instructions stating that no escrows will close until the attached subordination agreement(s) is (are) first recorded.

E. Copy of escrow instructions that contain a clause stating that no escrow shall close until the escrow holder has received written notice from a title company that it will issue a title insurance policy that ensures that all monetary encumbrances, excluding taxes and bonded indebtedness are subordinated to the declaration of restrictions, accompanied by a letter from the title company stating that it will issue such a policy.

F. Escrow instructions providing that no escrow will close until escrow holder has received written notice from a title insurance company that each and every encumbrance, including without limitation, any mortgage or deed of trust, filed of record prior to the time of recording of the CC&Rs has been either (i) fully reconveyed or (ii) expressly subordinated to the declaration.

■ Reference:

Real Estate Law: 11018.5(c)

■ Why required:

Subordination is a means to protect the homeowners' association and individual owners in cases of foreclosure by a lien holder. For example, without subordination, a construction lender could take possession of unsold units in the development without being bound by the CC&Rs, including assessment payment obligations. Subordination ensures that in such a case, the foreclosure will not jeopardize the operation of the HOA as specified in the CC&Rs, because all interest holders in the subdivision are bound by them.

■ Elements for review:

- Existing encumbrances which must be subordinated.
- Whether subordination to the CC&Rs occurred (if a subordination agreement is involved).
- Whether all encumbrances have been subordinated
- If via escrow instructions, are they properly worded.

■ Items for disclosure:

NA.

■ Item is unacceptable if:

- It does not accomplish subordination.
  - ☞ For subsequent phases in a phased project or for subsequent maps in a multiple-map project, there must be subordination to the declaration of annexation or to the supplemental declaration of covenants, conditions and restrictions or to the amended declaration of covenants, conditions and restrictions, i.e., there must be subordination to whatever document accomplishes annexation.

Question 49

PROPOSED DECLARATION OF ANNEXATION/SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS.

Required if project is phased and subsequent phases will be annexed to phase one.

A recorded declaration of annexation must be submitted prior to issuance of a final public report for the subject phase.

■ **Definition:**

The instrument by which subsequent phases of a multi-phased project are annexed or joined to the project. The declaration of annexation is the most frequently utilized instrument; however, annexation may also be accomplished via an amendment to the original CC&Rs or via Supplemental CC&Rs. The essential result is the subjecting of additional property, as per the detailed plan for the project and as contained in the CC&Rs or after a proper vote of the HOA to allow annexation.

☞ Property to be annexed that is not in substantial conformance with a detailed plan phased development submitted to DRE with the application for a public report with the first phase of the subdivision may be annexed provided there is a vote to add such property in accordance with Regulation 2792.27(a).

■ **Reference:**

Real Estate Law: 11018.5(e)

Comm. Regulation: 2792.1 and 2792.27

■ **Why required:**

To insure that subsequent phases of a multi-phased project will be properly annexed and are subject to the same restrictions and obligations as existing phases.

■ **Elements for review:**

- Definite time for commencement of assessments
- Adequate identification of property to be annexed
- Whether common areas will be overburdened
- Adequate easements
- Whether property is in substantial conformance with a "detailed plan"of phased development submitted to DRE in the first phase
- Inclusion of property in description of annexable property in the CC&Rs
- Phase is subject to same restrictions, architectural controls, assessment schedule and rights of ownership as previous phases

■ **Items for disclosure:**

- Recordation data of document
- Fact that project is phased
- Numerical designation of the phase or increment of the filing, if applicable.
- Date for commencement of assessments

■ **Item is unacceptable if:**

- Land to be annexed is not in substantial conformance with the original "detailed plan" of phased development and the HOA has not voted to annex by at least 66 $^{2}/_{3}$ % of the total votes residing in the Association members other than the subdivider.

Question 50A — C

DOCUMENTS TO BE FURNISHED TO HOMEOWNERS ASSOCIATION.

■ **Reference:**

Real Estate Law: 11018.5

Comm. Regulation: 2792.23

■ **Why required:**

This question may prompt the subdivider to supply the documents listed to the HOA. These documents are important to the HOA. The subdivider, by providing the documents, creates good will with the HOA and forestalls certain possible misunderstandings.

■ **Item for Disclosure:**

If any of the documents will not be made available and, as applicable, an alternate source for the information.

Question 51

DUPLICATE BUDGET PACKAGE (DBP)

■ **Definition:**

A collection of documents relating to the setup of the project and the estimated homeowner association/project operation cost.

■ **Reference:**

Comm. Regulation: 2792.1

■ **Why required:**

The duplicate budget package allows simultaneous review of the file by the Subdivision Deputy and the Budget Review Deputy. It also eliminates the necessity of transferring the main file from section to section or from office to office.

■ **Items for review:**

- See item analysis for each component document

■ **Item for disclosure:**

NA

■ **Item is unacceptable if:**

- The DBP is not complete when submitted

  ☞ *DBP Contents and Set-Up*

  A completed RE 681 is to be attached to the outside front of a side-tabbed, legal-sized, manila folder. All the DBP documents are to be attached inside by two-hole punch and Acco fastener. No writing/drawing on any document may be obscured when attached inside the manila folder. (See Figures E and F.)

  The items to be included in the DBP are:

  - Completed RE 681 (do not tab, fasten to outside of folder)
  - Five address labels for both the SRP and subdivider
  - Vicinity map (Item 30)

- Tract/parcel map (Item 27)
- Condominium plan (Item 28)
- Plot plan (Item 29)
- Conditions of approval (local agency)
- Part III of RE 624 - Notice of Intention (do not tab)
- RE 611A, if applicable (Item 32B)
- RE 623 (Item 37)
- Future phases information (Items 38A-38C)
- RE 624A(s) (Item 31A)
- RE 639 including all documents required by RE 639 (existing subdivision interest/conversions only; Item 33)
- Subsidy/maintenance agreement and supporting documents (Item 34)
- Existing and Proposed Contracts obligating HOA (Item 35)
- Use/easement agreements (miscellaneous documents)
- Bylaws (Item 45)
- CC&Rs (Item 47)
- Proposed Declaration of Annexation (I tem 49).

If the filing is a subsequent phase/map in a phased/multiple-map project, certain items may be deleted from the DBP for the subsequent phase, ***provided however***, that any pages from the below-listed documents which show changes must be submitted with the changes red-lined. Obviously, any item which was not included in the phase one/master file DBP may not be deleted even if it is among the items listed.

Items which might be deleted from the DBP include:

- Bylaws
- CC&Rs
- Tract map
- Phasing plan

For the above items which are not submitted in the subsequent phase (or map) DBP, mark "master file" in Column 5 of RE 624, Part II.

It is imperative that the (Master File) DRE File Number be prominently shown on the subsequent phase (or map) duplicate budget package and the DRE File Number of the file containing the most recent DRE budget review.

If this is a subsequent phase (or subsequent map) filing *and* if the budget for this phase was approved by DRE within the last 24 months *and* if there is *ABSOLUTELY NO CHANGE* in the offering or in the phasing plan from that which was approved, you may submit RE 684A, Certification (Approved Budget), in lieu of a duplicate budget package.

If an association has been formed, the following information should be included in the DBP submitted for subsequent phases in a phased project (or for subsequent maps in a multiple-map project or for subsequent maps/phases in a phased multiple-map project). The information must also be submitted with renewal and/or amendment filings. (See Operating Cost Manual for Homeowner Associations for more information. The Operating Cost Manual for Homeowner Associations is available free of charge on our Web site, www.dre.ca.gov, by clicking on the Publications tab. Use RE 350 to order a hard copy.

- The association's most recent audited financial statements for the past two years or from start-up, whichever is less.
  Also, a year-to-date statement. (Current year only.)
- A copy of the current or latest reserve study as required by Civil Code Section 1365.5(e).
- The Assessment and Reserve Funding Disclosure form required by Civil Code Section 1365.2.5.
- A copy of the association's current budget. If the HOA has approved the budget for the next fiscal year also include and indicate the commencement date for the fiscal year.
- A statement from the association showing the dollar amount of past due delinquencies. In particular, the statement should indicate assessments due, if any, from the subdivider.
- A copy of the following information as required to be distributed to the membership under Civil Code Section 1365 (A comprehensive reserve study should cover the items listed below):
  - The amount of the total cash reserves of the association currently available for replacement or major repair of common facilities and for contingencies.
  - An estimate of the current replacement costs of, and the estimated remaining life of, and the methods of funding used to defray the future repair, replacement or additions to, those major components of the common areas and facilities which the Association is obligated to maintain.
  - A general statement set ting forth the procedures used by the governing body in the calculation and establishment of reserves to defray the costs of repair, replacement or additions of major component of the common areas and facilities for which the association is responsible.

After the above documents have been reviewed, it may be necessary to request additional information if a clear picture of the financial status of the association is not presented. If the existing association has operating deficiencies and/or under-funded reserves, a special note will be included in the Public Report.

Question 52

CERTIFICATION

It is, of course, required that the subdivider certify that all information submitted in the Notice of Intention package is full, true, complete and correct. Generic signature pages should not be used.

Prior to signing, review all answers submitted. Errors or omissions must be corrected and initialed by the subdivider(s).

If the subdivider is a corporation, limited liability company (LLC), partnership, etc., the individual(s) signing the certification must stipulate the capacity (e.g., president, manager, general partner, etc.) of the signer and an authorization to sign (e.g., a corporate resolution, LLC statement, partnership statement, etc.) must be submitted. *[Master File Item]*

If an agent will be submitting documents to Department of Real Estate on behalf of the subdivider, the subdivider must provide written authorization to that effect. [Master File Item].

If the certification is signed outside the State of California, the signature must be acknowledged by a Notary Public.

- **Reference:**

  Real Estate Law: 11010(a)