

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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May 25, 2012

TO: Commissioners and Alternates
FROM: Steve Goldbeck, Acting Executive Director (415/352-3611 steveg@bcdc.ca.gov)
Tim Eichenberg, Chief Counsel (415/352-3655 time@bcdc.ca.gov)
SUBJECT: **Staff Report on Pending Legislation – AB 2226**
(For Commission consideration on June 7, 2012)

Summary and Recommendations

Assembly Bill 2226 (attached) by Assembly Member Hueso would require BCDC and other state and local government agencies to apply more restrictive Evidence Code standards to determine whether an applicant has a sufficient ownership interest in a property when applying for a permit. Commission staff sent a joint letter with the staffs of the Coastal Commission and State Land Commission to the bill's author on April 25, 2012 (attached) expressing concern about the difficulties in processing permits under the more restrictive standard of proof required by the bill. AB 2226 passed the State Assembly 53-11 on April 26, 2012, and was referred to the Senate Committees on the Judiciary, and Natural Resources and Water. The staff recommends that the Commission oppose this bill as currently drafted.

Background

To process permits for bay fill and shoreline development, BCDC is required by statute to determine if an applicant holds a valid property interest in a specific parcel of land. Section 66605 of the McAteer-Petris Act, and Appendix D and F of BCDC's regulations, requires applicants to prove that they have valid title or an adequate legal interest in the underlying property to carry out the project and comply with any conditions that the Commission may require as part of its approval. This good government practice is done routinely through submitting a grant deed, lease or easement, which is reviewed by staff to ensure it is valid and current. Few if any controversies have arisen with applicants over the review of these documents by BCDC staff.

AB 2226 would require all state and local government agencies to adhere to Section 662 of the state Evidence Code to determine who holds full beneficial title to property, rather than following the Administrative Procedures Act (APA) or their own specific statute and regulations. This would make it much more difficult for BCDC and other state and local agencies to determine who actually owns a parcel of land under consideration for development in carrying out its statutory mandate.



Making San Francisco Bay Better

Analysis

Section 662 of the Evidence Code provides that: “The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.” Section 662 requires a court to presume that the holder of title is entitled to full beneficial title, unless “clear and convincing proof” is provided to demonstrate otherwise.

It is unclear how the Commission or any state or local agency could reach the threshold of “clear and convincing proof” in a non-judicial proceeding. BCDC and other public agencies function very differently than courts, and currently are subject to the substantial evidence test under the APA to support their decisions. The APA provides a reasonable and workable standard. The Evidence Code currently applies to judicial proceedings, where participants have tools to obtain such proof—such as the power of discovery, subpoena, deposition, and sworn testimony. Such tools are not available in state and local administrative proceedings.

Increasing the burden of proof for state and local agencies without the commensurate judicial tools of discovery would make it much more difficult for BCDC to effectively carry out its statutory land use permitting, planning and other regulatory responsibilities. It also could lead to significant additional delays in processing permits and diverting staff time to pursue information that is not readily available.

Although a deed is presumably evidence of legal title, it is not always conclusive, especially with regard to submerged land in BCDC’s jurisdiction maintained and preserved for the public trust. AB 2226 would also make it difficult to determine actual legal interests where landowners form limited liability corporations (LLCs) and other similar corporate entities to carry out their projects. Although there are entirely appropriate business reasons for creating such corporate entities, they can also be used to conceal who has financial stakes in a development venture, making related entities appear separate to shield the real applicant’s identity. In these situations, it would be burdensome, and at times impossible, for the Commission to meet the clear and convincing standard of proof to demonstrate actual ownership interests because of the lack of judicial tools to meet the “clear and convincing” standard of proof.

BCDC routinely determines whether an applicant has valid title as required under the McAteer-Petris Act and our regulations. Therefore, this bill seeks to address a problem that does not exist, sets an unreasonably high bar of proof, and potentially creates significant impediments for agencies like BCDC that must ensure that applicants have the proper underlying legal interest to carry out their projects under the law.

Opposition

The staff signed on to a joint letter with the Coastal Commission and State Lands Commission to Assembly Member Hueso on April 25, 2012 expressing concerns about AB 2226 (attached). The Coastal Commission voted to oppose the bill on May 9, 2012, and the State Lands Commission is scheduled to vote on a staff recommendation to oppose the bill at their July meeting.

Recommendation

Staff recommends that BCDC vote to oppose AB 2226.

AMENDED IN ASSEMBLY MARCH 22, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2226

Introduced by Assembly Member Hueso

February 24, 2012

An act to add Sections 11440.70 and 50035 to the Government Code, relating to government proceedings.

LEGISLATIVE COUNSEL'S DIGEST

AB 2226, as amended, Hueso. Agency proceedings: evidence: presumption.

The Administrative Procedure Act governs the conduct of formal and informal proceedings before state agencies, as defined. Existing law specifies that in proceedings and hearings before a court, a presumption exists that the owner of the legal title to property is presumed to be the owner of the full beneficial title.

This bill would require a state agency, as defined, and a city, county, or city and county to apply that presumption in proceedings before that state agency, city, county, or city and county.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. (a) California's real estate economy is an
- 2 essential part of the state's economy.
- 3 (b) Stable and predictable title is an essential element of a
- 4 functioning real estate economy.

1 (c) The presumption of ownership of property specified in
 2 Section 662 of the Evidence Code is intended to provide certainty
 3 of title by creating a presumption that the owner of property is the
 4 owner of the full beneficial title, which may be rebutted only by
 5 clear and convincing evidence.

6 (d) The need to provide for certainty of title extends not only
 7 to court proceedings, but also to proceedings before state and local
 8 agencies.

9 (e) The purposes of this act is to ensure that state and local
 10 agencies apply Section 662 of the Evidence Code to proceedings
 11 before those agencies.

12 SEC. 2. Section 11440.70 is added to the Government Code,
 13 to read:

14 11440.70. In any ~~proceedings~~ *proceeding before an agency*
 15 *pursuant to this chapter or, Chapter 5 (commencing with Section*
 16 *11500), or any other statute or regulation, if the title to, or*
 17 *ownership of, property is in question, Section 662 of the Evidence*
 18 *Code shall control the determination of ownership. Notwithstanding*
 19 *Section 11415.10 or 11415.20, or any other law, this section shall*
 20 *apply to all state agencies, even if the state agency is otherwise*
 21 *exempt from this chapter or if the governing procedure of the*
 22 *agency is determined by a different statute or regulation.*

23 SEC. 3. Section 50035 is added to the Government Code, to
 24 read:

25 50035. In any proceeding before a city, county, or city and
 26 county, if the title to, or ownership of, property is in question,
 27 Section 662 of the Evidence Code shall control the determination
 28 of ownership.



April 25, 2012

Honorable Ben Hueso
California State Assembly
State Capitol, Room 5144
Sacramento, CA 95814

Re: AB 2226 – State Agency Concerns

Dear Assemblymember Hueso:

On behalf of the California State Lands Commission, California Coastal Commission, and San Francisco Bay Conservation and Development Commission, we wish to express our deep concerns about AB 2226. As this bill has only recently drawn our attention, we have not yet had the opportunity to request official positions from our respective commissions. But as agency Directors, we feel it is important to share our concerns with you and your colleagues prior to any further actions on the bill.

Our three commissions routinely address the development of land and water resources, through permits, leases and long-range planning. As such, our commissions must be able to determine with confidence who holds property interests in specific parcels of land before taking any regulatory or land management action.

We have noted with increasing frequency the practice of landowners shielding their identity from state agencies through the formation of limited liability corporations (LLCs) and other similar corporate entities. Although there are often entirely appropriate business reasons for the formation of such corporate entities, they can also be effective devices for concealing who has financial stakes in a development venture and for making entities that are in fact closely intertwined appear to be entirely separate.

AB 2226 would make it demonstrably more difficult for state agencies to pierce the corporate veil or otherwise determine the actual business realities behind mere record title to land ownership, as a function of responsibly carrying out their statutory mandates. By requiring all state agencies and local governments to adhere to Section 662 of the Evidence Code when assessing who holds full beneficial title to property, rather than following the Administrative Procedures

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Act or their own specific statute and regulations, the bill sets an unreasonably high bar.

Currently, the Evidence Code applies to judicial proceedings, not administrative hearings. Section 662 of the Evidence Code requires the court to assume that the holder of title is entitled to full beneficial title, unless "clear and convincing proof" can be provided to demonstrate otherwise. But the Evidence Code and the Code of Civil Procedure also provide participants in judicial proceedings with the tools to obtain such proof—tools such as the power of discovery, subpoena, deposition, and sworn testimony. In contrast, state agencies must meet the threshold of substantial evidence, a reasonable but less demanding standard. Increasing the burden of proof that state agencies must meet without the commensurate tools of discovery would have a chilling effect on the state's ability to effectively carry out their statutory land use planning activities and other regulatory proceedings.

We can foresee that this bill may have far reaching impacts on numerous other state agencies. We strongly urge you to reconsider your support for this measure, and will gladly meet with you to discuss any questions you may have regarding our concerns with this bill.

Respectfully,



Curtis L. Fossum, Executive Officer
California State Lands Commission



Charles Lester, Executive Director
California Coastal Commission



Steve Goldbeck, Acting Executive Director
San Francisco Bay Conservation and Development Commission