

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

BILL LOCKYER
Attorney General

OPINION	:	No. 03-1108
	:	
of	:	June 9, 2004
	:	
BILL LOCKYER	:	
Attorney General	:	
	:	
SUSAN DUNCAN LEE	:	
Deputy Attorney General	:	
	:	

THE HONORABLE JOHN J. SANSONE, COUNTY COUNSEL OF SAN DIEGO COUNTY, has requested an opinion on the following question:

May a county recorder accept for recordation a document denominated a “memorandum of lease” that states that the parties have executed a certain unrecorded lease, describes various terms of the lease, is signed, and includes a certificate of acknowledgment by both parties?

CONCLUSION

A county recorder may accept for recordation a document denominated a “memorandum of lease” that states that the parties have executed a certain unrecorded lease, describes various terms of the lease, is signed, and includes a certificate of acknowledgment by both parties.

ANALYSIS

The powers of a county recorder are defined by law. (77 Ops.Cal.Atty.Gen. 242, 243-244 (1994).) A county recorder is required to accept for recordation any document that is authorized or required by law to be recorded. Government Code section 27201¹ provides:

“The recorder shall, upon payment of proper fees and taxes, accept for recordation any instrument, paper, or notice that is authorized or required by statute or court order to be recorded, if the instrument, paper, or notice contains sufficient information to be indexed as provided by statute, meets recording requirements of state statutes and local ordinances, and is photographically reproducible. The county recorder shall not refuse to record any instrument, paper, or notice that is authorized or required by statute or court order to be recorded on the basis of its lack of legal sufficiency.”

Section 27322 additionally states: “The recorder shall record . . . all instruments, papers and notices the recording of which is required or permitted by law.” The obverse is also true: a county recorder is not authorized to record documents that are not required or permitted by law to be recorded. (See §§ 27203, 27204; *Ward v. Superior Court* (1997) 55 Cal.App.4th 60, 66; 82 Ops.Cal.Atty.Gen. 107, 108 (1999); 77 Ops.Cal.Atty.Gen., *supra*, at pp. 243-244.)

The question presented for resolution concerns whether a county recorder is authorized to accept for recordation a “memorandum of lease,” acknowledged by both parties,² which specifies certain elements of a lease, but which refers to a separate, unrecorded document as containing the complete terms of the lease agreement.³ We are informed that the benefits of recording such a memorandum would be that notice of the

¹ All further statutory references are to the Government Code unless otherwise indicated.

² A certificate of acknowledgment is governed by the terms of Civil Code sections 1180-1207. For example, when a certificate of acknowledgment of an instrument is “executed on behalf of an incorporated or unincorporated entity by a duly authorized person,” it “shall be prima facie evidence that the instrument is the duly authorized act of the entity named in the instrument and shall be conclusive evidence thereof in favor of any good faith purchaser, lessee, or encumbrancer.” (Civ. Code, § 1190.)

³ A lease is both a conveyance of an estate for years in real property and a contract between landlord and tenant for the possession and use of property in consideration of rent. (*Ellingson v. Walsh, O’Connor & Barneson* (1940) 15 Cal.2d 673, 675; *Samuels v. Ottinger* (1915) 169 Cal. 209, 211.) As a conveyance of an estate for years in real property, a lease is specifically authorized by law to be recorded. (Civ. Code, §§ 1213, 1215.)

leasehold interest would be given (see Civ. Code, §§ 1213-1214), the expense of recording the entire agreement would not be incurred, and the disclosure of confidential and proprietary information could be avoided.⁴

At a minimum, a memorandum of lease identifies the parties, the property in question, and the term of the lease. A memorandum may also contain present language of leasing (e.g., “Landlord hereby leases to tenant and tenant leases from landlord . . .”), rather than merely referring to the fact of the lease agreement (e.g., “This memorandum evidences that a lease was entered into . . .”).

First, with respect to a memorandum of lease containing present words of conveyance, we believe that the document constitutes a “conveyance” within the meaning of Civil Code section 1215. (See *Garber v. Gianella* (1893) 98 Cal. 527, 529; *Goldstein v. Ray* (1981) 118 Cal.App.3d 571, 575.)⁵ A conveyance is a recordable instrument. (Civ. Code, § 1213.) A memorandum of lease that contains present language of leasing is thus recordable. (See, e.g., 5 *Miller & Starr, Cal. Real Estate* (3d ed. 2000), § 11.6, p. 26; 2 *Miller & Starr, Cal. Real Estate Forms* (1992), §§ 2.12, 2.13; 6 *Cal. Real Estate Law & Practice* (1989) § 153.83; Dean, et al., *Commercial Real Property Lease Practice* (1976) §§ 3.137, 3.236, pp. 179-180, 259-261; 1 *Ogden’s Revised Cal. Real Property Law* (Bowman ed. 1974) §§ 12.4-12.5, pp. 491-492).

As to a memorandum that does not contain present words of conveyance, we note the language of section 27280, subdivision (a), which provides: “Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter.” Section 27279, subdivision (a), defines the term “instrument” as follows: “ ‘Instrument,’ as used in this chapter, means a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty.” (See *Hoag v. Howard* (1880) 55 Cal. 564, 565; *Plaza Freeway Ltd. Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 621-625; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 683.)

A memorandum of lease neither transfers title to real property nor gives a lien on real property. Does it give “a right to a debt or duty” for purposes of section 27279? We

⁴ We understand that commercial leases commonly run to 100 pages or more and often contain exhibits that are difficult to read when scanned for recordation.

⁵ Civil Code section 1215 states: “The term ‘conveyance,’ as used in sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which title to any real property may be affected, except wills.”

believe that it does. A memorandum of lease such as we are considering here is a manifestation of the parties' mutual assent to the fact of the bargain memorialized in the unrecorded lease document. (See *Plaza Freeway Ltd. Partnership v. First Mountain Bank*, *supra*, 81 Cal.App.4th at pp. 626-629.)

In 13 Ops.Cal.Atty.Gen. 185 (1949), we examined whether a party executing a deed of trust may instruct the recorder not to record certain conditions and reservations referred to in the deed of trust. Although the document thus tendered would contain less than the full agreement between the parties, we concluded:

“. . . In those cases where an instrument on its face purports to affect title to or possession of real property, and where all prerequisites to recording are met, the document should be received by the Recorder notwithstanding it may be legally ineffective to accomplish its recitations or may be afforded less than the usual protection. The Recorder's duty is performed upon receipt of the document proper on its face and the subsequent recording and indexing thereof; he is neither required nor permitted to further pass upon the contents of the instrument.” (*Id.* at p. 186.)

Similarly, here, a memorandum of lease may be recorded even though not all the terms of the lease agreement are set forth in the memorandum.

If any doubt remained as to whether a memorandum of lease constitutes an “instrument” as defined in section 27279, we need only look to section 27288, which provides:

“If the instrument is an agreement for sale, lease, option agreement, deposit receipt, commission receipt, or affidavit which quotes or refers to an agreement for sale, lease, option agreement, deposit receipt, commission receipt, or lease and such instrument claims to, or affects any interest in real property, it shall be executed and acknowledged or proved . . . by the party who appears by the instrument to be the party whose real property is affected or alienated thereby.”

Section 27288 refers to an “instrument” as including an “affidavit which quotes or refers to an agreement for sale, lease” This statutory language demonstrates that the Legislature did not intend to limit the scope of recordable instruments to documents that describe all of the terms of the parties' agreement. Rather, the Legislature intended that documents evidencing real-property transactions—including an affidavit that quotes or refers to a document evidencing the transaction—may be recorded under section 27280.

This same legislative intention is expressed in section 27288.1, subdivision (a), which states: “If the document effects *or evidences* a transfer or encumbrance of an interest in real property, the name or names in which the interest appears of record . . . shall show the name or names of the assessed owners as they appear on the latest secured assessments roll.” (Italics added.)⁶ A memorandum of lease “evidences” the lease transaction.

Finally, we note that recording abbreviated forms of real property agreements is a long-standing practice (see, e.g., *Douglas v. Schindler* (1930) 209 Cal. 616, 618-619; 13 Ops.Cal.Atty.Gen., *supra*, at pp. 185-187; Ogden, Cal. Real Property Law (1956), § 10.3, p. 362), and one that is still being advised (see, e.g., 1 Cal. Landlord-Tenant Practice (Cont. Ed. Bar 2d ed. 2004) § 1.13, p. 28 [“A tenant with a favorable long-term lease, a lease with an option to purchase or other contingent interest, or a lease containing rights affecting co-tenants (*e.g.*, an exclusive clause in a lease for shopping center space) should consider recording the lease or a memorandum of the lease”]).

Because a memorandum of lease is an “instrument” within the meaning of section 27279, it is recordable since it “affect[s] the . . . possession of real property.” (§ 27280, subd. (a).) As previously indicated, a lease of real property grants the tenant exclusive possession for the term of the lease. (*Kaiser Co. v. Reid* (1947) 30 Cal.2d 610, 619.)

We conclude that a county recorder may accept for recordation a document denominated a “memorandum of lease” which states that the parties have executed a certain unrecorded lease, describes various terms of the lease, is signed, and includes a certificate of acknowledgment by both parties.

⁶ “Of course, we interpret a statute in context, examining other legislation on the same subject, to determine the Legislature’s probable intent. [Citation.]” (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 642.) Here, we may interpret the language of section 27279 in light of the related provisions of sections 27288 and 27288.1.