

Law would shield public real estate transactions

By Jim Sanders, Sacramento Bee

When CalPERS balked at releasing records that could shed light on its decision to invest \$100 million in an East Palo Alto housing project that failed, a judge ordered disclosure nearly three years ago.

San Francisco Superior Court Judge Charlotte Woolard's ruling said it is difficult to imagine a more critical time for public scrutiny of the decision-making process than when public funds are at stake.



But newly proposed legislation would make such real estate records confidential in the future, requiring public agencies to disclose gains or losses on a project but not documents that could show why a deal was made, risks involved, marketing strategy or partnership terms.

Assemblyman Kevin Mullin said his Assembly Bill 382 is designed to strike a balance between open government and the need to protect public investments from competitive disadvantage.

Withholding "sensitive information" about real estate deals is in the public interest to "ensure that pension funds are as profitable as possible so that taxpayers aren't left holding the bag," said Mullin, D-South San Francisco.

The California Public Employees' Retirement System has taken no position on AB382, which is sponsored by the State

Association of County Retirement Systems.

California's pension systems invest massive sums in real estate – CalPERS, for example, had real estate investments exceeding \$24 billion on Jan. 1, roughly 10 percent of its total investments.

Peter Scheer, director of the First Amendment Coalition, which sued CalPERS in the East Palo Alto case, said the pension agency has been involved in large real estate deals that went sour.

AB382 would “increase the chances that mistakes will be made in real estate investments” because critics would be deprived of documents that could prompt them to raise red flags, Scheer said.

“I think public pensioners and the taxpayers generally benefit from as much transparency as possible,” he said.

The East Palo Alto project raised public-policy as well as investment issues after tenants complained they were harassed and driven out in an effort to circumvent the city's rent-control laws.

AB382 would add real estate to a list of “alternative investment vehicles” for public agencies – including hedge funds, venture capital funds and private equity funds – that generate internal documents that have been exempt from disclosure since 2005.

Gov. Arnold Schwarzenegger signed the limited exemption in 2005, responding to concerns that state agencies would lose lucrative opportunities to partner with private investment groups because proprietary information might be released through public records requests.

A legislative analysis of the 2005 legislation, Senate Bill 439, said that investments by the University of California in

its top two performing funds over a 14-year period, generating \$1.84 billion for UC, were in jeopardy unless changes were made to public records law.

The 2005 bill was a compromise stemming partly from litigation by the First Amendment Coalition and others that resulted in CalPERS disclosing its fees to venture capital firms. The McClatchy Co., owner of the *Bee*, is a member of the First Amendment Coalition.

Specifically, the changes from 2005 require public agencies to release records identifying each investment, dollars committed, profits, cash distributions, internal rates of return, and management fees and costs.

However, public agencies can withhold investment agreements, capital call notices, portfolio positions, due diligence materials, information distributed at partner meetings, and quarterly or annual financial statements about a project.

Robert Van Der Volgen, chief counsel for the Los Angeles County Employees Retirement Association, said AB382 would protect strategic real estate records that could be exploited by other investors.

"We get lots of requests from people who just want to compete: What's your rental rate? What's your lease rate? If I tell you that, especially if you own the building across the street, I basically just put myself at a competitive disadvantage," Van Der Volgen said.

Attorney Karl Olson, who filed the East Palo Alto lawsuit, said that AB 382 could result in withholding documents that could show, for example, that a staff recommendation not to invest in a massive project had been ignored or that a private partner was nearly bankrupt when a big deal occurred.

Scheer said that state law already provides confidentiality if an agency can show that withholding a document "clearly

outweighs the public interest served by disclosure.” It also exempts appraisals and other real estate-related evaluations prior to a sale involving public funds.

“Beyond that limited exception, I think the rule should be – and it should apply to real estate transactions as much as any other – that the public is entitled to know all the basic information about these kinds of deals,” Scheer said.