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real estate newsletter

Spring 2014 hogefenton.com

Drought?

What drought? There is certainly no "drought" in transactions. Since last we talked, Hoge Fenton attorneys have represented buyers, sellers, landlords and tenants in deals including 242,000 square feet. Has the lack of water impacted our real property clients? Overall, I would have to say very little. The residential market appears unfazed, but with the high percentage (many observers suggest 33%) of all-cash and investment purchases, that is probably to be expected. Office building owners don't seem too worried, either. The only sector I've seen directly impacted are government-owned land and their neighbors. One of my clients owns agricultural land adjacent to a community college. The community college needed more water for a minor expansion project. Where to get that water? Condemnation! The college asserted its power of eminent domain for the right to dig a well. It will be interesting to note if we see more of this from governmental entities if the drought worsens.

Have you seen any impact of the drought on real property transactions? Let us know – we'll report back next newsletter.

Thank you for reading.

Daniel W. Ballesteros,
Editor and Managing Shareholder

Upcoming:

June 18: Silicon Valley Real Estate Breakfast, "SPUR's Big Ideas for Achieving a More Successful and Active Downtown San Jose"

Archives you may find of interest:

Winter 2014 Real Estate Newsletter

Drought Prompts New Water Use Restrictions

by **Justine M. Cannon**

New water conservation directives may mean fewer green lawns and sparser landscapes this summer. As Californians face drought conditions, Bay Area governments and water districts have reacted to encourage – and in some instances, to force – water conservation on local businesses and residents. Governor Jerry Brown declared a state of emergency earlier this year, calling for a voluntary 20% reduction in water usage and asking water suppliers and municipalities to implement water shortage contingency plans. Local cities and water wholesalers have fallen in line, with varying levels of severity.

Some water districts, such as the Santa Clara Valley Water District and the Alameda County Water Agency, have requested voluntary reductions in water usage of approximately 10% to 20%. But the most severe change comes from the East Bay. The City of Pleasanton implemented a *mandatory 25% reduction* in water usage. Stiff fines will be imposed on businesses, government offices and households that use more than 75% of the water consumed last year. The reduction is measured against the amount of water consumed by each customer in 2013 – causing an unfortunate difficulty for those business owners and residents who have already made conservation efforts.

Another notable change affects homeowners associations (HOAs) that require homeowners to maintain landscaping. Governor Brown's April 25, 2014, executive order limits the ability of HOAs to fine homeowners who take landscaping water conservation measures. The order makes void and unenforceable any HOA rules or guidelines that prohibit compliance with water-saving measures set forth in the order, or adopted by any agency or water company. For example, the order limits watering of lawns and landscaping to no more than twice per week. This doesn't mean a homeowner can cease caring for landscaping altogether—but HOAs should think twice before threatening fines against homeowners complying with this or any other water-saving restrictions. In the Bay Area's hotter cities, this may mean dead plants and lawns.

Business owners and residents should be aware of the water use restrictions, and possible monetary penalties, imposed in their city and be prepared to alter water consumption accordingly.

2013 Ends with Five Transactions in Santa Clara, Fort Worth and Peoria

Sean Cottle assisted clients in closing five transactions in Q4 2013.

Sean helped a client sell 9.58 acres of land in Fort Worth, Texas that had 122,400 square feet of retail space. The client retained the mineral rights to the property.

Locally, Sean assisted clients in selling a two-story office building located in north San Jose. The site consisted of 5 acres with 96,000 square feet of office space and a seven-year lease that the buyer assumed. Sean also helped another client, San Jose Water Company, acquire the single-story office building adjacent to the water company's headquarters on Taylor Street in San Jose.

As 2013 ended, Sean helped negotiate, and assisted with due diligence and closing, on behalf of two clients. The first transaction involved the sale of 1.25 acres of land in Santa Clara with a building 6,500 square feet in size that included a Bank of America branch. Sean previously helped negotiate a 10-year year extension to the lease with the bank in early 2013.

The other transaction was in Peoria, Illinois. Sean helped negotiate and close the investment property for the buyer, which included a single-story retail building of 15,000 square feet on 1.6 acres of land. The property has an existing 20-year lease with tenant Walgreens.

Plumbing Suppliers Celebrate New Law

by **Justine M. Cannon**

Owners of California homes built before 1994 face additional costs when remodeling their homes. A law that took effect this January may require homeowners to install water-efficient plumbing throughout the home in order to obtain a building permit.

The statute – which was codified in the Civil Code, not the building code – requires installation of water-conserving fixtures **as a condition of building permits applied for after January 1, 2014**. The local building department will check for installation of water-conserving fixtures prior to issuing a certificate of final completion or final permit approval.

What triggers a plumbing upgrade? The short answer: any remodel that requires a permit. As drafted, the law would require plumbing upgrades even when the room being remodeled does not contain plumbing fixtures – such as a bedroom, living room, or garage. Maintenance that does not require a permit, such as water heater replacement, installation of a new roof, HVAC replacement, or window replacement, does not trigger an upgrade.

"Water-conserving fixtures" include toilets that use less than 1.6 gallons of water per flush, shower heads with a flow of less than 2.5 gallons per minute, and interior faucets that emit less than 2.2 gallons per minute.

For now, the law applies only to single-family homes built before January 1, 1994, **but eventually will apply to all properties**. Low-flow fixtures will be required in *all* single-family homes by 2017, and in *all* apartment and commercial buildings by 2019, *even without applying for a permit*. Ultimately, the law will impose obligations on sellers to disclose non-compliant fixtures to a potential purchaser, and may even place an obligation on a tenant to notify the landlord if fixtures are observed to function below water-conserving standards.

Homeowners considering applying for a building permit should budget with this new requirement in mind – and owners of multi-family and commercial properties should be aware of the 2019 deadline.

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For over 60 years, Hoge Fenton has counseled clients in the real estate industry and represented landowners, commercial and residential developers, landlords, tenants, financial institutions, mortgage bankers, title and escrow companies, real estate brokers and other real estate professionals

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LOIs: Proceed with Caution

by **Justine M. Cannon**

In the commercial real estate market, many purchase and lease transactions begin with a letter of intent (LOI), also called a "term sheet" or "memorandum of understanding." The LOI is generally intended to be a nonbinding document, establishing the framework to negotiate a formal agreement.

An LOI must be drafted with extreme caution. Even when parties agree that it is nonbinding, things can change quickly when a deal falls through and one side wants to enforce the contemplated real estate transaction. When a dispute arises, the Court looks at the content of the LOI to determine the parties' intention. **Expressly stating that an LOI is "nonbinding" or "subject to approval of a formal contract" may not be enough to defend against a breach of contract action.**

Here are some points to consider when drafting a nonbinding LOI:

Be Aware of the Terms in the LOI: An LOI that contains all of the essential terms of a contract **may bind the parties.** California courts have a very narrow interpretation of what constitutes "material terms" in a real estate contract – and an LOI that identifies the buyer and seller, identifies the property, and sets the purchase price may contain enough essential terms to constitute a binding contract. Other terms, such as the manner and timing of payment, may be considered immaterial to determining whether the parties intended to enter into an enforceable agreement.

Avoid "Accepting" LOI Terms: Language included in an LOI such as "agree," "offer," and "accept" may be interpreted as an agreement to be bound by the terms of the LOI. For example, in a federal appellate case involving the sale of a piece of property near San Jose's Santana Row, *First National Mortgage Co. v. Federal Realty Investment Trust,* California's Ninth Circuit was unpersuaded by the fact that the LOI was a one-page "proposal." Because the parties accepted essential terms in writing, an enforceable lease agreement was created and the plaintiff was awarded significant damages for breach of contract and lost rent for the ground lease. The absence of a subsequent formal agreement was immaterial.

An Agreement to Negotiate May Bind You: A mere "agreement to agree in the future" would be unenforceable, but an agreement to *try to agree* is enforceable. Where the parties to an LOI agree to negotiate the terms of the transaction, a failure to reach ultimate agreement would not, itself, constitute a breach – but failure of a party to negotiate in good faith would. In *Copeland v. Baskin Robbins U.S.A.*, the California Court of Appeal held that Baskin Robbins' commitment to engage in negotiations constituted an enforceable obligation. Baskin Robbins breached the agreement by breaking off talks and refusing to enter into an ancillary but required ice cream supply agreement. The Court held that Baskin Robbins failed to negotiate in good faith and therefore would be liable for any damages Copeland suffered in relying on Baskin Robbins' promise to negotiate.

Mind Your Actions: In addition to the terms of the LOI itself, a court may look to the parties' actions in determining whether they intended to enter into a binding contract. Avoid taking any actions that would imply that there exists an intent to be bound by the LOI, or a belief that an enforceable contract exists between the parties. For example, avoid making public announcements that a deal has been reached.

In California, ensuring that a Letter of Intent remains nonbinding can be tricky. Call a Hoge Fenton real estate attorney for guidance with letters of intent, and any other real estate questions.

Finances and Fences

by **Allison A. Manov**

It is not always easy to obtain financial contribution from your neighbor for building, repairing or maintaining a shared fence. The California legislature attempted to ease this tension by passing the Good Neighbor Fence Act of 2013.

The act clarifies the financial responsibilities of neighbors by presuming that neighbors are *equally* responsible for maintaining boundaries, including fences.

A landowner who intends to incur an expense for maintaining or constructing a shared fence or other boundary must provide written notice to the adjoining landowner(s) 30 days beforehand. The notice must:

- Include a statement of the presumption of equal financial responsibility for the costs incurred to replace or maintain a shared fence, and
- Describe the nature of the problem of the shared fence, the proposed solution, the estimated cost, and the proposed timeline for the work.

This presumption may be overcome in certain situations; call your attorney.

Hoge Fenton hosted the Silicon Valley Real Estate Breakfast February 4, with guest speaker Craig Saxton of Specialty's Cafe.

"When Dawn and Craig Saxton opened their first Specialty's Cafe & Bakery in San Francisco's financial district 27 years ago, they knew they had to hit $1,700 in receipts on opening day to make a profit. The Pleasanton-based chain is on track to break $100 million in revenue this year...." *Read the full article by Nathan Donato-Weinstein, San Jose Business Journal*, http://www.bizjournals.com/sanjose/news/2014/02/04/specialtys-sees-another-20-bay-area.html?ana=e_du_pub&s=article_du&ed=2014-02-04&page=1

We were pleased to sponsor a hole at the CREW Silicon Valley Annual Golf Tournament. CREW (Commercial Real Estate Women) is dedicated to advancing women in commercial real estate. At the Hoge Fenton hole, a par 5, participants were asked to roll a large die that determined which club they would use to drive off the tee box, including their "hand wedge" (throw the ball). Some golfers surprised themselves by how well they could drive their putters!

inside Hoge Fenton.

Meet Allie Manov. Allie is an associate in our Silicon Valley real estate litigation group and is interested in local real estate issues as someone born and raised in the Bay Area. Allie graduated from Palo Alto High School, UC Berkeley, and Santa Clara University School of Law.

Allie's practice focuses on residential matters, handling cases ranging from protecting brokers from allegations of inadequate disclosures to bringing actions to enforce residential purchase agreements. Allie is interested in the complex aspects of real estate law and determining the most effective manner to resolve her clients' disputes.

Allie and her husband recently purchased their first home. She certainly understands the homeowner's perspective, now that her husband has partially flooded the kitchen, installed a hot water recirculation system, and otherwise tinkered around the house.

A general sports and outdoor enthusiast, Allie enjoys playing volleyball as well as traveling, and visiting her six-month-old nephew. You can usually find her on a volleyball court somewhere, whether at national tournaments or on the beach in Santa Cruz.

#3, Manov, fourth from left