



**HOGE FENTON**

Hoge Fenton Jones & Appel

Attorneys at Law | Founded in 1952  
celebrating 60 years of modern solutions



Fall 2013

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“Patience is a virtue.” This proverbial phrase dates back to the fifth century. I am pleased to confirm that it is just as relevant today. If you have managed to successfully carry real property through the recession, now is the time for your reward. This pleasant turn of events is borne out by the development projects we all enjoyed on the Downtown San Jose Tour, including the Convention Center, the new home of the San Jose Earthquakes, and the fully occupied downtown residential towers. It’s also reflected in the two deals Real Estate Group Chair Sean Cottle closed this past quarter. Both deals were eight years in the making! Even litigation is picking up the pace as owners want to move forward with long-planned projects unencumbered by litigation. The signs in the real estate industry are all pointing up. The time for waiting is at an end. Your patience will be rewarded. Let our experienced real estate attorneys help you achieve your long-delayed goals.

Thank you for reading.

Daniel W. Ballesteros,  
Editor and Managing Shareholder

**Upcoming:**  
*September 25 & 26: Fall Employment Law Seminars*  
*October 1: Real Estate Breakfast*

**Archives you may find of interest:**  
 Article: Signed a Fraudulent Agreement? You May Have a New Arrow in Your Quiver  
 Spring 2013 Real Estate Newsletter



**Recap of the 2013 Downtown San Jose Tour**

by Lisa L. Gorecki

The long anticipated return of the Downtown San Jose Tour took place

on May 2, 2013. The event was well attended by a large and enthusiastic group of real estate professionals eager to see and hear about new real estate developments – as well as current and future development opportunities – in downtown San Jose.

The tour kicked off at the lively San Pedro Square Market. Real estate professionals networked and noshed, and then boarded charter buses for a narrated, information-packed crawl around the downtown core and surrounding areas. A major highlight of this year’s tour was the stop at San Jose McEnery Convention Center, where attendees were treated to a sneak peek of the impressive new addition. Other stops included a view of the future home of MLS team San

Jose Earthquakes, the Pierce Reed Associates residential project at Market and Pierce, and the dramatic, newly enclosed lobby of the office tower at 55 S. Market Street.

After learning about dozens of buildings and projects throughout downtown San Jose, the tour ended with a cocktail reception on the patio of Los Gatos Brewing Company. The patio was abuzz with excited discussion about what we had seen and heard. If you missed the 2013 Downtown San Jose Tour, we hope that you will join us for the next one! (Please contact Patty Blanquies, pvb@hogequenton.com to be placed on our contact list.)

# recent Hoge Fenton projects.

## Eight Years in the Making: Residential Development Deal Closes

by Sean A. Cottle

After riding the real estate roller coaster with one of our property owner clients for more than eight years, the sale of their property to a national developer finally closed on June 19, 2013, three months before their outside closing date.

The clients were a partnership of family members who owned several industrial/commercial buildings on approximately eight acres of land adjoining Ferguson Drive in Mountain View. In May of 2005, they retained us to assist with changing the zoning from industrial/commercial to residential and to join other property owners to develop what eventually became known as the South Whisman Precise Plan.

After meeting with city council members and staff and appearing before several public hearings, we and the adjoining property owners were able to persuade

the city of Mountain View to allow the project to proceed as a city-driven project. The project initially involved amending the General Plan, approving an environmental impact report (EIR), and adopting a specific plan for the area which consisted of more than 40 acres. The city council approved a General Plan Amendment, the EIR and the South Whisman Precise Plan in April 2009. At that time, the developer, with whom our client was in contract to sell the property, believed the real estate market did not justify moving forward with the project, so backed out of the deal.

We helped our clients to get back into contract with a national developer in 2011. We worked with and assisted the developer as it contracted with an adjoining property owner, and interacted with city staff to move the project forward.

The developer gave notice this spring that it wanted to close the transaction and buy the property sooner than the stated outside closing date. In June, we worked with the partners to successfully close the deal.

In describing the eight-year process, Karen Jessen (one of our property owner clients) said, "It's been a long haul, but we finally made it, and we couldn't have done it without you [Hoge Fenton attorney Sean Cottle]. I certainly appreciated your professionalism in the face of some of the others involved, and all the other stumbling blocks that were thrown at us. Your calm, knowledgeable demeanor was so necessary to the process, and made things a lot easier for me and my team."



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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...

## Other Property Owner Clients Close Deal after 8 ½ Years of Trying

by Sean A. Cottle

More evidence that new life has been breathed into the real estate development market: Another of Hoge Fenton's family-owned property clients closed their transaction after getting into contract to sell on six different occasions, and we were there for them every step of the way.

Three related family groups finally sold their combined three acres of land on Berryessa Road in north San Jose to Pulte Homes Corporation on July 15th. The families first approached us for assistance in getting into a contract

to sell their property to a developer in April 2005. That developer backed out of the transaction in October that year when then-Councilmember Chuck Reed determined that the three-acre property should be developed as part of a 20-acre master plan, high density development with the surrounding 17 acres. After getting in and out of contracts with three other potential developers, the clients, with attorney Sean Cottle's assistance, first entered into an agreement with Pulte in June 2007. However, given the declining state of the economy and the quickly falling real estate market back then, that contract died a natural death.

After patiently waiting out the market, forward to February 2011, when the

clients and Pulte again got into contract again. The transaction closed this summer with the assistance of Hoge Fenton's real estate team led by Cottle and consisting of paralegal Ginger Thornell and assistant Andrea Lorenz. Pulte currently has an approved map to build 72 residential units within nine structures on the three acres.

Dr. Vincent Nola, one of our clients, said during the representation that, "Sean Cottle handled multiple purchase agreements with several national homebuilder companies [for our family acreage that was previously agricultural]. He was always there to provide us with good and sane real estate advice, and to protect the interests of the multiple family owners."

# recent developments in case law.

## Take Note: New Energy Use Disclosure Requirement Takes Effect

by Lisa L. Gorecki

Beginning September 1, 2013, owners of nonresidential buildings may have to comply with new Energy Use Disclosure Requirements. Assembly Bills 1003 and 531 require the disclosure of energy use prior to the sale, lease or financing of a whole building.

Does your building need a Disclosure Report? If you answer YES to *all* of the following questions, then you are *required* to generate a disclosure report.

1. Is the entire nonresidential building being offered for sale or lease, or is it subject to new financing?
2. Is the gross square footage of the nonresidential building greater than 50,000 square feet\*?
3. Is the nonresidential building one of the following building occupancy types, as defined in the California Building Code and as listed on the building occupancy permit?
  - a. Assembly (A)

- b. Business (B)
- c. Education (E)
- d. Institutional - Assisted Living (I-1, R-1)
- e. Institutional - Nonambulatory (I-2)
- f. Mercantile (M)
- g. Residential - Transient (R-1) (for example, a hotel)
- h. Storage (S)
- i. Utility - Parking Garage (U)

\* If the nonresidential building is 50,000 square feet or less, you may still need to report. Buildings with gross square footage in excess of 10,000 will need to report beginning January 1, 2014, and buildings with gross square footage of 5,000 or more will need to report beginning July 1, 2014.

To learn more, visit <http://www.energy.ca.gov/ab1103/index.html>

## Recent Reform to California ADA Imposes New Requirements on Commercial Lessors

by Lisa L. Gorecki

On July 1, 2013, a new commercial lease disclosure requirement went into effect.

All commercial property owners and lessors must disclose in the lease or rental agreement whether the property has been inspected by a Certified Access Specialist (CASp) and whether or not the property meets all applicable construction-related accessibility standards. The disclosure requirement does not apply to residential property, but it applies to all commercial leases and rental agreements executed, amended or renewed on or after July 1, 2013.

This new law is the most significant reform to California's Americans with Disabilities Act (ADA) laws. Among other things, the law now prohibits pre-litigation "demands for money" from owners/lessors, prevents "stacking" multiple claims to increase damages, reduces the amount of statutory damages, and provides protections for owners/lessors who correct violations.

Much of the new law focuses on stricter procedures imposed on plaintiffs' attorneys bringing lawsuits for ADA violations, and greater protections for businesses sued for violations of the ADA.



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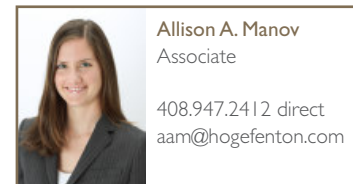
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real estate finance   commercial leasing   purchase & sale   construction contracts & litigation  
environmental law   green building and technology   mergers & acquisitions   real estate receivership

## Case of First Impression: Court Upholds Shortened Time to File a Construction Defect Lawsuit

by Lisa L. Gorecki

In an important, precedent-setting decision (*Brisbane Lodging, L.P. v. Webcor Builders, Inc.*), the California Court of Appeal has upheld AIA contractual language limiting the builder's liability for latent defects to four years after substantial completion of the project.

Webcor Builders was the prime contractor on a hotel project developed by Brisbane Lodging. The project was substantially complete in 2000. Problems with the building were discovered in 2005, and Brisbane Lodging sued Webcor in 2008. Although the suit was filed within the

10-year statute of limitations for latent construction defects, Webcor argued that the suit was time-barred under the terms of its AIA contract with the developer. The developer argued that such a bar would mean its statute of limitations had run before it had even discovered the defect. The court was not persuaded, however, and upheld the four-year time limitation imposed by the contract.

The standard AIA agreement between Brisbane and Webcor contained the following language:

[A]ny applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of Substantial Completion. (Section

13.7.1.1 of AIA General Conditions)

Although a standard AIA form was used, the Court found it significant that the agreement was extensively negotiated between sophisticated parties who were represented by legal counsel. The parties knowingly and mutually agreed to a shortened period of time within which suit could be brought.

**What should developers and builders do?** Contractors and developers should be acutely aware of the language that appears in their own standard contracts. It now appears possible to effectively – and intentionally – shorten the 10-year statute of limitations, and to tie the running of the limitation period to the date of substantial completion of the work.

# inside Hoge Fenton.

*Meet* Dave Hofmann. David grew up in the Bay Area, graduating from Lowell High School in San Francisco; U.C. Berkeley ('64) and U.C. Hastings School of Law ('67).

David and his partner, Phil Steinbock opened their San Jose office in 1968. In 2003, David and Phil joined Hoge Fenton.

David's practice emphasizes real estate and real estate finance, including representation of major private lending funds, major land holders, and commercial property owners. His philosophy is to find the most cost effective and timely solutions for his client's legal challenges.

David has served as an Adjunct Professor at Santa Clara Law School and as Chair of the Real Estate section of the Santa Clara County Bar Association. He has also lectured extensively on real estate matters for the California Association of Realtors and National Association of Realtors.

Devoted to assisting kids at risk, David has continuously volunteered in group homes, homeless shelters and schools. For the last 6 years, he has acted as a mentor at the Boys and Girls Clubs of Oakland.



David comes from a close knit family that traces its roots in California back to the Gold Rush. He and wife, Lenore, love to travel (recent trips to the Amazon and Vietnam) and spend time with their two sons, Jeffrey and Mark and their children.



Left to right: Dan Ballesteros, Tim Maximoff, Natasha Parrett, Stephanie Sparks, Jan Fox, Mike McSweeney, Alison Buchanan and John Adams

*Eight* of our attorneys were honored by Northern California Super Lawyers, as published in the August edition of San Francisco Magazine and Northern California Super Lawyers Magazine. Approximately 5% of the Northern California Bar receives this distinction, as determined by a poll of California lawyers and through independent research conducted by Law & Politics. **Two are from our Real Estate Group!**

Hoge Fenton's 2013 Super Lawyers:

- Dan Ballesteros, Business and Real Estate Litigation
- Alison Buchanan, Business Litigation and Professional Liability/Professional Malpractice
- Jan Fox, Estate Planning and Wealth Management
- Tim Maximoff, Taxation and Trusts & Estates
- Mike McSweeney, Real Estate Litigation & Risk Management
- Stephanie Sparks, Intellectual Property, Privacy, Data Security

Hoge Fenton's 2013 Rising Stars (top up-and-coming lawyers):

- John Adams, Business and Real Estate Litigation
- Natasha Parrett, Family Law

global REACH  
local KNOWLEDGE  
outstanding RESULTS

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