HOGE FENTON
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celebrating 60 years of modern solutions

real estate newsletter

Summer 2012 hogefenton.com

Welcome to Hoge Fenton's Summer 2012 Real Estate Newsletter! Has the real estate downturn ended? We think so. However, the legislature and the courts, in their typical reactive style, are still focused on the mortgage crisis and the issues arising out of it. So, the recent legal developments sections of this newsletter remains so focused.

Response to our last newsletter was very strong. Our goal is to provide you, the reader, with the information you want and need to be a successful owner, developer, buyer, seller, lender, investor, landlord or tenant in the Silicon Valley and the Tri Valley regions. Toward that end, we invite you to share with us some of your recent experiences in the world of real property. Is the recession over? What impact has it had on you personally? On your industry? Have you had any recent experiences in which having hired a real estate lawyer would have helped you avoid a pitfall?

Depending on the response, I'd like to share some of your stories in our fall newsletter, of course with the names changed to protect the innocent! Hoge Fenton has been serving our clients for sixty years. Let us know how we may better serve you.

Thank you for reading.

Daniel W. Ballesteros,
Editor and Shareholder

Upcoming Events:
Silicon Valley Real Estate Breakfast
SCCBA Real Estate Symposium (October 26)
Watch for our announcements!

Archives you may find of interest:
Winter 2012 Real Estate Newsletter
2012 Estate Planning Newsletter
Article: Effective ways to help your client win the uphill retail development battle

Possibility of Recovering Deposits in a Rising Market

by Sean A. Cottle

Can buyers recover their deposit and avoid paying liquidated damages if the transaction does not close?

The answer? As with many things related to the law, it depends.

Parties to a real estate transaction may be surprised to learn that defaulting buyers can recover their deposit when the transaction fails to close. In a rising market, buyer may be entitled to recover the deposit because seller will not have suffered any harm. Since the real estate market appears to be turning around, parties to a transaction that does not close, as well as their real estate brokers and agents, should be aware of the possible outcome.

A California Court of Appeal held that seller cannot retain a deposit because seller did not sustain any actual damages. See *Kuish v. Smith* (2010) 181 Cal. App. 4th 1419. In that case, buyer sought the refund of his deposit when he unilaterally cancelled escrow and seller subsequently sold the beach residence for more money without returning the deposit. (Seller actually earned an additional $1 million because of buyer's cancellation of the contract.)

Seller alleged that the contract described the deposit as "non-refundable." The Court of Appeal ruled that seller would have to return the $600,000 deposit if seller did not suffer that amount in actual damages. Otherwise, seller's retention of the deposit would be an invalid forfeiture.

Since we currently find ourselves in a real estate market where purchase prices are on the rise, sellers may not be able to withhold all of the deposits when a transaction fails and seller sells the property for a higher purchase price.

Sellers and buyers should know that there may be other ways to craft contract provisions that give sellers the ability to withhold deposits even in a rising market. For more information, consult with a knowledgeable real estate attorney.

significant Hoge Fenton projects.

Developing Raw Land in Urban Areas

by Geoffrey C. Etnire

Hundreds of acres of raw land within city limits? In the Bay Area?

That may sound fanciful, but there are hundreds of acres of raw land, in small and large parcels, located within city limits through the Bay Area. Geoff Etnire and the Hoge Fenton real estate team have been engaged to obtain entitlements for 130 acres within the City of Cupertino and 100 acres within the Town of Fairfax.

The remaining raw land in the Bay Area holds great potential pay-offs for the owners, but the challenge of developing in urban areas can be staggering:

- Raw land often has physical challenges, such as awkward locations, hills, riparian corridors, flood plains, prescriptive easements, and other features that make development difficult
- Often public and city governments view this land as *de facto* open space, an important green resource for the community
- Providing access and utilities to raw land can be difficult when existing development in the area occurred without planning for this land
- The untouched land often serves as limited refuge for endangered and threatened animal and plant species

Cashing in on the development potential of this remaining land presents a complex combination of legal, political environmental, engineering, and financial challenges.

The 130 acres in Cupertino is located near Deep Cliff Golf Course and the county park. Geoff, the Hoge Fenton team and City staff will conduct meetings with neighborhood groups about potential development.

The 100 acres in Fairfax is located in a hilly area near the town center. The Hoge Fenton team will meet with the town staff and position the property for sale.

Hoge Fenton was chosen by the owners of these properties for their experience in land use and development, credibility with environmental organizations, and experience managing complex land use entitlement efforts.

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For 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...

Deal: Large Bay Area Lease

by Sean A. Cottle

Although 2012 started off with a slowing in the industrial lease market, deals continue to be closed. Sean Cottle this year helped a client and its asset manager, **Dan Amend of Toeniskoetter Development**, negotiate termination of a lease and a new lease for one of the largest recent industrial transactions in Milpitas, California. The property consists of just over 77,000 square feet and includes office, R & D, and production facility space.

Amend and Cottle helped the client terminate a 1994 lease with Seagate Technologies LLC and its predecessor by negotiating and drafting a termination agreement that addressed, among other things, restoration and early termination obligations.

The termination negotiations dovetailed with contemporaneous talks to allow the existing subtenant, Soladigm, Inc., to become the tenant.

The end result was a three year, triple net lease with Soladigm, Inc. at current market rates with an option to extend the lease for an additional three years.

Once the transaction concluded, Amend observed that the deal was documented quickly. He chalked this up to having a good team of real estate attorneys who know how to get a deal done and know which lease provisions matter.

Seller and listing broker must disclose that property for sale is "underwater"

Seller (and its broker) must disclose all known facts that materially affect the value and desirability of the property, which facts are not within diligent reach of buyer.

Largely, such disclosures are made with regard to defects in the physical condition of the property. However, over time the courts have expanded the definition to include non-physical issues, such as neighborhood noise, smells, traffic, etc.

In *Holmes v. Summer* (2010) 188 Cal. App.4th 336, buyers complained that neither seller nor the listing broker had disclosed that the property was subject to three deeds of trust totaling $1,141,000, on a contract price of $749,000. This almost $400,000 gap made it extremely unlikely that seller would be able to deliver clear title at the close of escrow. Deprived of this knowledge, buyers sold their existing home and prepared to close escrow and move in.

After the trial court sided with sellers, dismissing the complaint on demurrer, the Court of Appeal sided with buyers. The court was not persuaded by the broker's argument that there was no duty to disclose because the liens were public record, nor even that buyers would be made aware of the liens when they received the preliminary title report. The Court of Appeal held that the seller/broker were obligated to disclose the liens before the buyers had even made their offer! The moral of the story? Disclose to buyer everything that you would want to know about the property.

Real estate broker did not earn a commission by bringing a $17,000,000 all cash offer

The decision in *RealPro, Inc. v. Smith Residual Co., LLC* (2012) 203 Cal. App.4th 1215 has real estate brokers throughout the state concerned about their commissions. The listing agreement provided a sale price as follows: "$17 million cash *or* such other price and terms acceptable to [sellers], and other additional standard terms reasonably similar to those contained in . . . [a specified purchase agreement f[o]r such other price and terms as agreeable to [sellers]."

The plaintiff's broker thought he had earned his commission by bringing a $17 million all-cash offer, from a ready, willing and able buyer. Seller countered at $19.5 million, claiming that $17 million was the listing price and not the "full price."

The court agreed and emphasized the placement of the first "or" in the listing agreement and treated the $17 million price as merely an invitation to submit offers. In doing so the court failed to even discuss the vast majority of reported commission cases decided in the last decade.

More than anything this case highlights the vulnerability of selling agents to the whims of a seller.

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...with expertise in:
commercial banking and lending commercial leasing construction environmental law
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Homeowners' Bill of Rights

Governor Brown Signed Tough New Anti-Foreclosure Laws

by Daniel W. Ballesteros

The Homeowners' Bill of Rights (HB of R) will slow down the foreclosure process.

Whether you think that is a good thing and will prevent fraud in the foreclosure process or a bad thing that will only serve to extend the mortgage crisis, largely depends on your political views.

With nearly 700,000 California homeowners in some stage of foreclosure or otherwise delinquent on their mortgages, the law will certainly have a large impact.

Specifically the HB of R will end the practice of "dual tracking," which is when a lender is simultaneously engaged in both the loan modification process and the foreclosure process. Under the new rules, lenders are prohibited from initiating foreclosure while processing a homeowner's loan modification.

Key points of the laws include:

- Requiring lenders to provide a borrower a single point of contact for the purposes of discussing loan modifications
- Increasing the ability of homeowners to sue lenders for monetary damages in the case of wrongful foreclosure
- Municipalities will have additional tools to fight blight occurring as a result of foreclosure
- Purchasers of foreclosed property must honor leases with existing tenants for a minimum of 90 days.

California Governor Jerry Brown signed the laws on July 12, 2012, and they will take effect January 1, 2013.

inside Hoge Fenton.

Left to right: Sblend Sblendorio, Jan Fox, Jonathan Hicks, Alison Buchanan, Geoffrey Etnire, Stephanie Sparks, Daniel Ballesteros. *Not pictured: Timothy Maximoff*

Eight Hoge Fenton Attorneys were honored by Northern California Super Lawyers. For the ninth consecutive year, we are pleased to announce attorneys 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. **Three are from our Real Estate group!**

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Meet Sblend Sblendorio. Sblend has been practicing law for 29 years and is known throughout Northern California for his ability to put together, and more importantly keep together, real property and business transactions.

Sblend's practice focuses exclusively on real estate, commercial, and finance matters. He assists his clients nationwide with real estate, land use, commercial negotiations, bankruptcy and insolvency.

Sblend is receiving well deserved recognition throughout the country for his leadership in assisting Paragon Outlets in an extremely large and complex development project, Paragon Outlets Livermore Valley. The 543,200 square foot project sits on almost 43 acres and will house 120 retailers. In his spare time, Sblend pursues his passion for wine. A grower himself, Sblend is a past president of the Livermore Valley Winegrowers Association and continues to be a staunch advocate of the Livermore Valley appellation.