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real estate newsletter

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We're devoting this issue of the real estate newsletter to the idea of liability -- and tips on how to avoid it. If your ***building is in noncompliance*** with energy, take a look at Sean's article below. ***ADA compliance*** cases are heating up in our region once again. Over 75 were filed arising out of one weekend! We have some helpful suggestions on how to avoid becoming a target. For a while, ***design professionals, including architects and engineers***, have owed no prospective liability to future home (or building) owners. All that has changed with the California Supreme Court's recent opinion in *Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill LLP.*

And, speaking of liability, Hoge Fenton has broadened and deepened its ability to protect you from potential liability by bringing three elite and experienced real estate attorneys onboard. Look for information on **Lee Bardellini**, **John Cavin** and **Steven Kahn** in our "inside Hoge Fenton" feature!

Thank you for reading.

Daniel W. Ballesteros,
Editor and Managing Shareholder

Upcoming:

October 30 -- Downtown San Jose Real Estate Tour, www.downtownsanjosetour.com. More info below.

Archives you may find of interest:

Spring 2014 Real Estate Newsletter

Deadline for California Energy Use Disclosure for Nonresidential Building Owners Extended

by **Sean A. Cottle**

If you own a nonresidential building with 10,000 square feet or less of gross floor area, you do not have to register your property with the U.S. Environmental Protection Agency's ENERGY STAR program until July 1, 2016.

The California Energy Commission in early August sought to amend the compliance schedule for the Nonresidential Building Energy Use Disclosure Program by filing an emergency regulatory action with the Office of Administrative Law. The Commission proposed to amend the applicable regulation by changing the compliance date from July 1, 2014 to July 1, 2016 for nonresidential buildings of 5,000 to 10,000 square feet.

On September 2, 2014, the State of California Office of Administrative Law approved the Commission's proposed amendment to subsection (c) of section 1682 of title 20 of the California Code of Regulations. The emergency regulatory action expires on March 3, 2015.

Stay tuned to see if the California Energy Commission takes any further action with regard to the Nonresidential Building Energy Use Disclosure Program in the future.

Downtown Tour!

On October 30th, luxury tour buses will once again crawl the streets of downtown San Jose and surrounding areas, treating guests to an in-depth, narrated tour of local real estate opportunities: what's new, what's exciting, and what's coming soon.

This year's tour includes **exciting stops at the new Earthquakes Stadium and Centerra luxury apartments.**

Founded in 2003 by Hoge Fenton, Colliers International and the San Jose Downtown Association, the event is also hosted by AEI Consultants.

Come see and hear why commercial, residential, retail, technology, and hospitality investors are choosing Downtown San Jose. We will be joined by local real estate professionals – developers, builders, lenders, investors, brokers, attorneys, accountants, owners, tenants, buyers, sellers – and public officials. For more information and to register, visit downtownsanjosetour.com.

ADA Litigation is on the Rise and Small Businesses are Being Targeted

by Daniel W. Ballesteros and Justine M. Cannon

Recent years have seen a marked increase in the number of lawsuits filed against businesses and building owners for violations of the Americans with Disabilities Act (ADA). Earlier this year, we made a presentation to the San Jose Downtown Association, which held a special meeting about a "serial plaintiff" who had filed ADA lawsuits against 75 local businesses. This plaintiff, John Ho, had already made his way through Southern and Central California, collecting hundreds of thousands of dollars in settlement from business and property owners.

John Ho is not alone. There are several "serial plaintiffs" throughout California bringing formulaic lawsuits alleging accessibility violations, sometimes without even actually visiting the business. California has 40% of the nation's ADA lawsuits but only 12% of the country's disabled population.

Current Federal and State Laws

The federal ADA, and state law — including the Disabled Persons Act (DPA) and Unruh Act — privatize the process. Instead of using taxpayer money to hire government inspectors to ensure ADA compliance, such laws allow private citizens to sue property owners and businesses and demand repairs.

Federal and state accessibility standards must be adhered to every time a commercial or public building or area is designed, built, remodeled, or repaired. Accessibility standards cover everything from the maximum slope allowed in a parking lot to the allowable height of a customer counter. California's standards are, of course, stricter than federal.

Legislative Help?

In 2012, Senate Bill (SB) 1186 aimed to curb ADA lawsuit abuse by providing some limited protections to defendants. SB 1186 identifies circumstances in which business and property owners can reduce — but not eliminate — statutory damages by completing repairs within a prescribed period of time, or by participating in the CASp inspection process (*see Kim Blackseth's inset article*).

What Constitutes a Violation?

Many estimate that less than 5% of California businesses are in complete compliance with accessibility laws. Even minor violations —a bathroom mirror installed slightly too high, or a display rack too close to a door—can be violations. The most common violations relate to accessibility in parking lots, paths of travel, and restrooms.

Does a Plaintiff Have to Give Notice Before Bringing a Lawsuit?

Currently, no pre-litigation notice is required - but legislators are working on it. H.R. 994, or the "ACCESS Act," was introduced in March 2013 by Rep. Ken Calvert. The bill would require written notice to a business owner, specifying the alleged violations, before filing a lawsuit. It would then give the business owner 120 days in which to repair the conditions. If timely completed, a lawsuit would be prohibited.

H.R. 994 is not yet law. For now, the first notice of an ADA lawsuit will usually be service of a complaint.

What Will it Cost an Owner?

A plaintiff can require that a business owner remedy any and all violations at the premises. California law allows a plaintiff to recover actual and statutory damages. The DPA and Unruh Act allow a plaintiff to recover from $1,000 to $4,000 *per offense*.

A prevailing ADA plaintiff is also entitled to recover reasonable attorneys' fees. Thus, in addition to paying your own lawyer, unless you prevail on every claim, you will also have to pay the plaintiff's lawyer. In a recent case involving a local restaurant, the restaurant and the landlord successfully argued that the hydraulic lift demanded by plaintiff was not "readily achievable." Unfortunately, the judge decided that the restaurant should have offered curbside service to accommodate disabled patrons. The plaintiff was awarded only $14,000 in damages, but the defendants had to pay not only their own lawyer, but more than $750,000 in fees and costs to reimburse plaintiff.

Can a Business Successfully Defend an ADA Lawsuit?

It is certainly possible to obtain a defense verdict. Clint Eastwood did! Defense verdicts happen when the repairs sought by plaintiff are not "readily achievable." This is especially true in older or historic buildings. Similarly, plaintiffs must demonstrate they were actually at the property for a business purpose. This may be difficult where the same plaintiff has filed numerous lawsuits involving the same limited time period.

How Can a Business Insulate Itself From ADA Lawsuits?

Compliance with accessibility standards is the ideal protection. Although compliance does not prohibit a complaint being filed, completing the CASp inspection process is a strong deterrent as certification may be displayed.

If your business is served with an ADA complaint, it is important to seek the counsel of the right attorney who can assess the validity of the plaintiff's claims, find your strongest defenses, negotiate the best possible outcome, and, if necessary, strongly represent your interests at trial. Contact Daniel W. Ballesteros or Justine M. Cannon for assistance with ADA issues and litigation.

Why Should you Hire a CASp?

by Kim R. Blackseth

A Certified Access Specialist (CASp) has been tested and certified by the State of California. A CASp will know which standards apply to your property based on the age of your facility and its history of improvements. Only a CASp can provide services that offer you "qualified defendant" status should a claim be filed against you. You can retain the services of a CASp at any time; however, you will benefit the most if inspection services, including the delivery of a CASp Inspection Report, occur before a claim is filed against you.

You are not required to hire a CASp. An election not to hire a CASp is not admissible in court.

After an inspection is completed, a CASp will issue a Disability Access Inspection Certificate. While you are advised to keep the report itself confidential, the certificate is offered to you as proof that you are a holder of a CASp report. Proponents suggest that posting the certificate acts as a deterrent to ADA plaintiffs.

Kim R. Blackseth, Interests, Inc., has provided ADA and accessibility consulting for 24 years. Kim is CASp certified and has received many honors and appointments. If you would like to schedule a CASp inspection, or if you have questions about the CASp process, please contact Kim Blackseth at kimblackseth@mac.com.

Architects and Engineers Have Expanded Liability – Even When Not Directly in Contract with Homeowners

by **Justine M. Cannon**

The California Supreme Court recently clarified that construction design professionals owe a duty of care to future homeowners – even when the architect or engineer is not directly in contract with the homeowner – and can be found to be negligent and liable under the correct facts.

The Court in *Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill LLP* held that design professionals in a principal role – not working subordinate to another design professional – can be held liable to future homeowners for negligent design of a residential building. This is true even if the architect does not actually build the project or exercise control over construction decisions.

The *Beacon* case involved a 595-unit condominium complex in San Francisco with alleged construction defects causing extreme indoor temperatures due to "solar heat gain." The HOA alleged that the heat gain resulted from negligent architectural design of the building, including substandard windows and inadequate ventilation. The project developer hired the architect and the HOA claimed to be a third party beneficiary to the contract.

Design professionals can no longer rely on their historical argument that they do not have a contractual relationship with the future homeowners. An architect can no longer escape negligence liability on the ground that someone else – be it a developer, contractor or homeowner – made the final construction decisions.

The Court considered many factors in evaluating the facts and reaching its decision. **The landscape has now changed, leading to greater potential liability – both directly to the future purchasers of the property and to the developer or other party with whom the design professional entered into contract.** It seems possible given this ruling that design professionals in the future may face expanded liabilities stemming from commercial construction design as well. In any case, the Beacon decision will change the approach to construction litigation for plaintiffs, architects and other construction professionals.

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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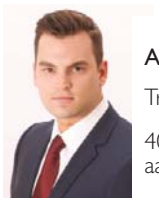

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Meet Lee Bardellini, John Cavin and Steven Kahn. *inside* Hoge Fenton.

Formerly of the Bardellini, Straw, Cavin and Bupp firm in San Ramon, they joined Hoge Fenton in July. Well known and respected for their expertise in complex real estate litigation, real estate transactions, and title insurance law, the lawyers will continue to represent owners of real property in all manner of litigation including disputes involving ownership, use and control. They represent regional and national title companies as well as their insured owners and lenders in complex real property disputes. The three will reside primarily in Hoge Fenton's Tri-Valley office.

Steven Kahn concentrates on real estate and business litigation, with particular expertise in disputes over property ownership, use and control, title insurance, escrows, and claims involving real estate professionals. He also counsels clients in real estate transactions and commercial leasing matters.

Steven, his wife, and their adorable rescue dogs, Missy and Ginger, live in the Tri-Valley area. Steven grew up in Marin and comes from a family of small business owners – his father was a solo attorney for over 35 years, while his mother, uncle, grandparents, and now his brother run successful retail clothing businesses in the Bay Area. Steven speaks conversational Spanish, learned from his Chilean mother, and tries to brush up when visiting his parents, who are now retired in Chile. Steven and his wife love to travel to Europe – their last trip was two glorious weeks in Croatia. In his free time, Steven enjoys practicing yoga with his wife, CrossFit, and long-distance road cycling.

Lee Bardellini focuses on complex commercial real estate litigation, representing title insurers, escrow companies, brokers and lenders. He also provides advice, counsel and coverage opinions in a broad range of real property related matters.

Lee is a native of the bay area. His family has been in the Pleasanton–Livermore Valley area since the 1800s (his great grandfather opened a hotel in Pleasanton in the 1860s and operated a vineyard in the Livermore valley). Lee followed his father and grandfather into the practice of law. Lee enjoys photography and going on road trips in his restored 1967 Austin Healey 3000 vintage sports car.

John Cavin is an experienced real estate and commercial litigator, with clients ranging from start-ups to established commercial real estate businesses and professionals. He has extensive expertise in title insurance, escrow operations, and the construction industry.

The son of a lawyer, John is the eldest of five children. He was born in Oklahoma but grew up in southern California. After college, John worked in-house at a heavy-equipment construction company, which gave him firsthand experience dealing with labor disputes while working on a negotiating committee opposite the Operating Engineers, eventually resolved when President Carter sent in a federal mediator. Family man John and his wife Debbie have lived in Danville since 1987. They have beautiful identical twin daughters, Kristen and Erin, who now live in Dallas. An avid outdoorsman, John likes to fly fish and camp and golf in his spare time.