



HOGE FENTON

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Attorneys at Law | Founded in 1952
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Winter 2014

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Welcome to 2014. 2014 looks to be a strong year. How can I tell? Did I read another economic forecast from the experts? No. I looked out my office window. From my vantage point from the 14th floor of 60 South Market Street in downtown San Jose, I can see no fewer than three major projects under construction: Centerra, One South Market and the Santa Clara County Family Justice Center courthouse.

How else can I tell? My business is picking up. There are more disputes between owners and contractors, buyers and sellers, co-owners, and adjoining land owners. These disputes are the lifeblood of my practice, and I am passionate about advocating for the rights of my clients. Many such disputes simply cannot be avoided and are a cost of doing business. However, many of the disputes I am seeing today could have been avoided with good prophylactic legal counsel.

We wish you successful deals and great prosperity in the new year. As the recovery continues and your activity picks up, we hope you consider investing in quality legal counsel. An ounce of prevention today surely trumps a pound of cure later. Happy 2014!

Thank you for reading.

Daniel W. Ballesteros,
Editor and Managing Shareholder

Upcoming:

*January 22 & 23: Annual Employment Law Update --
Year in Review and Preview*

*February 4: Silicon Valley Real Estate Breakfast,
"Where Do We Put the Next Store?" with
guest speaker Craig Saxton of
Specialty's Café and Bakery*

Archives you may find of interest:

Fall 2013 Real Estate Newsletter



**REMINDER: Nonresidential
Building Owners Must Comply
with Energy Use Disclosures**
by Sean A. Cottle

Starting January 1, 2014, an owner
of a nonresidential building with a

total gross floor area measuring more
than 10,000 square feet **is required
to comply with the Nonresidential
Building Energy Use** requirements of
Section 1680 *et seq.* of Title 20 of the
California Code of Regulations.

The building owner will need to
retain a consultant in order to obtain
an ENERGY STAR Score and a Data
Verification Checklist. The Score and
the Checklist must be disclosed to a
prospective buyer or lessee at least 24
hours prior to execution of applicable
contracts, or to a lender no later than
submittal of the loan application.
Building owners also need to open
an account for the building on the
EPA's ENERGY STAR program Portfolio
Manager website.

We recommend that customized
leases and purchase agreements
be revised accordingly to add new
disclosure provisions.

Contact an attorney in Hoge Fenton's
Real Estate Group if you would
like further information about the
disclosure requirements, or to revise
lease or purchase agreements.

recent Hoge Fenton projects.

Sale of High-Profile Historical Building in Los Gatos



Hoge Fenton represented the buyer of a vital building in downtown Los Gatos, the Coggeshall Mansion. The historic building was constructed as a residence for a wealthy widow in 1891. For several decades, it housed a mortuary. Since the 1970s, it has been occupied by various restaurants, most recently, Palacio. The exterior retains its

18th century charm while the interior's 7,300 square feet were modernized and remodeled recently.

The Town of Los Gatos has several conditions to maintain the building. As such, the client needed assistance to evaluate the Town's conditions to ensure that the investment would meet the client's investment objectives. In addition, the lease placed several obligations upon the owner which we evaluated for the owner.



Hoge Fenton attorney **Sblend Sblendorio** represented the buyer by negotiating the closing and coordinating the due diligence for acquisition of the property. Sblendorio said, "The transaction posed particular challenges due a quick closing

and the unique nature of the historical building." He added, "Hoge Fenton is quite proud to have assisted our client in the acquisition of such a high profile property."

Ranching Family Successfully Subdivides and Sells East Bay Property

An established ranching family subdivided over 400 acres, of which 14 were sold to a major home builder in the East Bay. The title company said that the pending escrow for sale and entitlement of the property was their longest pending escrow -- more than ten years.

We were able to accomplish close of escrow by successfully guiding our clients through multiple complexities including Internal Revenue Code 1031 exchanges, park dedications, mitigation easements, and lot line adjustments. Hoge Fenton attorney **David Hofmann's** client said, "He can take frustration away from complicated situations by being creative and positive. On the personal side, he is compassionate and has a sense of humor. Let's just say, he gets it."



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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...

Increasing ROI and Cost Segregation

In early December, **Sblend Sblendorio** with Luis Ramirez of Abbott, Stringham & Lynch, CPAs, and Norbert Crabtree of CSP360 presented a seminar on increasing return on investment (ROI) through the use of the cost segregation.

In September, the IRS published its final regulations on the expensing and capitalization of tangible assets and repairs and dispositions. All businesses that own real estate will be affected by these regulations. Taxpayers without a capitalization policy must adopt a policy. The final regulations provide guidance

to taxpayers for cost segregation of tangible assets. The proper use of cost segregation pushes deductibility of depreciation of tangible assets into earlier tax periods.

Since the marginal federal taxes on ordinary income increased by 15.7% from 2012 to 2013, and on capital gains by 58.6% from 2012 to 2013, accelerating depreciation can be a wise strategy.

For a copy of the presentation:
http://www.hogequenton.com/Templates/media/files/publications/HowtoIncreaseYourROIinRealEstateVenturesDec5_2013wdisclaim.pdf

Sale of Apartment Complex and Minimizing Tax Impact

On behalf of the sellers, Hoge Fenton attorney **Sblend Sblendorio** negotiated the sale of a 172-unit apartment complex located in Glendale, Arizona. The sellers held the complex in an area that had not recovered from the Great Recession.

Any sale carries the possibility of adverse tax impacts if not structured properly. Sblendorio was able to structure a purchase agreement that provided the clients with minimal tax impact while allowing for the buyer to acquire title and negotiate a short payoff of the debt.

recent developments in case law.

When Does a Change in Ownership of Real Property Trigger Reassessment? by Lisa L. Gorecki

The Court of Appeal for the First Appellate District recently ruled that the transfer of a brother's joint tenancy interest in real property to himself as a tenant-in-common was subject to reassessment for property tax purposes.

Historically, people commonly used joint tenancies for estate planning purposes (parents would deed real property to themselves and their children as joint tenants). The task force that helped define "change in ownership" under Proposition 13 proposed that family joint tenancies be treated like the creation of a will since upon the death of one joint tenant, that deceased joint tenant's interest automatically passed to the remaining joint tenant(s). Since the creation of a will does not trigger reassessment of the property, the task force felt that the creation of a joint tenancy in real property, where the transferor is one

of the joint tenants, similarly should not trigger reassessment. Eventually, the property gets reappraised upon the termination of the joint tenancy (which generally occurs upon the death of the last surviving parent).

Although referred to as "family joint tenancies" and generally done between parents and children, the recommendations of the task force, now codified in Sections 60 through 65 of the California Revenue and Taxation Code, cover any joint tenancy created by a person who becomes one of the joint tenants.

In *Benson v. Marin County Assessment Appeals Board*, the Court didn't allow a brother to transfer his joint tenancy interest in the real property to himself as a tenant-in-common without reassessment. Peter Mikkelsen created a joint tenancy with his brother whereby each brother owned an undivided 50% interest in the property. Under the joint tenancy, upon the death of his brother, the other brother would become the full owner of the property without

reassessment.

With both brothers still alive, one of the brothers transferred his 50% interest to himself as a tenant-in-common. The Marin County Assessor reassessed the property, increasing the property value by more than \$400,000. The transferring brother challenged the reassessment on the basis that a change in the method of holding title, without changing the proportional interests, was not a change in ownership. The Marin County Assessment Appeals Board and the trial court agreed with him.

The Court of Appeal found that reassessment was proper upon the termination of a joint tenancy when a joint tenant converts the interest into a tenancy-in-common. The Court opined that otherwise, the Mikkelsen brothers would benefit from the tax break upon creation of a family joint tenancy and escape reassessment by changing the method of holding title prior to reassessment being triggered when one of them died.



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...with expertise in:

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

Easement Limited to Historical Use

by Allison A. Manov

In *Rye v. Tahoe Truckee Sierra Disposal Company*, the California Court of Appeal limited an easement holder's use of the encumbered property based on historical use.

At issue was an "easement for parking, ingress, egress, utilities and storage," on the eastern portion of the property. The plaintiff owned the encumbered property, out of which he ran a business. The defendant, Tahoe Truckee Sierra Disposal Company was a garbage disposal business that had an the easement to the eastern

portion of Rye's property, historically used only as a staging area. The conflict between the parties arose when Rye began storing items on the encumbered portion of his property.

The Court held that the easement should be limited to Tahoe Truckee's historical use of the property subject to the easement. When an easement is created, the permissible uses are determined by the intention of the parties and purpose of the grant. After a reasonable time, the extent of the permissible uses is established by past use. The Court further refused to infer that Tahoe Truckee had exclusive use of the property subject to the easement from the general language

of the easement.

Tahoe Truckee contended that it was entitled to use the whole of the encumbered eastern portion of the property, essentially arguing that it had an exclusive easement. The Court disagreed, holding that Tahoe Truckee could not later enlarge the character or the use of the encumbered property.

Accordingly, an easement holder must be careful to confine its use of a property to historical uses. The easement holder may not enlarge or expand on its earlier use of a property based on the easement language.



Legends & Leaders event, left to right: Dan Ballesteros, Justine Cannon, Sarju Naran, Alison Buchanan, Hon. Leon Panetta, Peter Feinberg, Denise Chambliss, Sean Cottle. Photo by Dave Lepori of Lepori Photography

Hoge Fenton supports its local chambers of commerce by sponsoring events and serving on various boards. In December, some of our attorneys attended the San Jose Silicon Valley Chamber of Commerce “Legends & Leaders” event and had the opportunity to meet Monterey-native Leon Panetta. Politician and lawyer, Panetta has served as Director of the Central Intelligence Agency and Secretary of Defense.

Attorney **Sean Cottle** has served on the Board of Directors for the San Jose Silicon Valley Chamber of Commerce since January 2010. He was elected as First Vice Chair for 2014. In January 2015, Cottle will be in position to become the Chairman of the Board of Directors of this 128 year old organization that is the region’s voice of business.

Another Hoge Fenton attorney was elected -- technically *reelected*: real estate and litigation attorney **Daniel Ballesteros** was reelected for a second term as the firm’s managing partner.



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inside Hoge Fenton.

Meet Steve Siner. A second-generation Silicon Valley attorney (and his daughter will soon start law school to become a third-generation Siner attorney), Steve has spent the past 40 years in private practice in both our Silicon Valley office and in Pleasanton at our Tri-Valley office. Steve was also a licensed real estate broker for many years so he has been “in the trenches” and has firsthand experience with real estate transactions as well as litigation. His practical, hands-on approach has helped many deals close successfully and his experience over the years has allowed him to structure transactions so future problems and litigation are avoided.

Steve is often retained directly by commercial brokers to assist them in complex transactions. He has worked on purchases, sales, sale lease-backs, exchanges and leasing. He has touched most sectors of the commercial real estate market over the years, and is a sought-after speaker for commercial real estate groups and has taught continuing legal education in real estate courses for attorneys.

In no small part due to his personal succession planning experience with his father, Steve has gained expertise in transferring wealth, not just in real estate, to successive generations. He is a frequent guest speaker at retirement workshops and at adult education programs for various colleges and universities in the Bay Area. Steve has also devoted quite a bit of his time to helping the elderly with the challenges they face.



In his spare time Steve and his wife Laura love to travel, scuba dive, play with their dogs and exercise. They love touring the nooks and crannies of Europe and diving in Hawaii. Although he hates to admit it, Steve dotes on his daughter and subtly brags about her accomplishments whenever he can.