



HOGE FENTON

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celebrating 60 years of modern solutions



Spring 2013

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Welcome to Hoge Fenton’s Spring 2013 Real Estate Newsletter! It is an exciting time for real estate in the Silicon Valley and Tri Valley regions. The housing market has been steadily rebounding. Developers are building new homes and existing homes are receiving multiple offers. Construction is well underway on the new 49ers Stadium in Santa Clara. And the Paragon Outlets Livermore and Hoge Fenton were recognized at San Francisco Business Times March 20th (more, below). Read on to see other transactions recently concluded by our real estate lawyers and recent developments in real estate law.

Our full service approach to serving our clients was an asset to the Paragon Outlets deal and can be an asset to your upcoming real estate transaction. While our transactional attorneys will help you avoid any issues or disputes, we understand that problems can and often do arise and our experienced real estate litigators will help you through the process when those disputes are unavoidable.

Hoge Fenton has been committed to exceptional client service for more than sixty years and we look forward to serving you.

Thank you for reading.

Daniel W. Ballesteros,
Editor and Managing Shareholder

Upcoming:
May 2: Downtown San Jose Real Estate Tour
June 19: Real Estate Breakfast -- with Bill Sherry
Watch for our announcements!

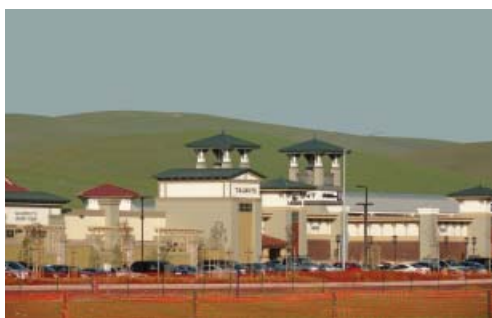
Archives you may find of interest:
 Summer 2012 Real Estate Newsletter
 2012 Estate Planning Newsletter
 Article: Effective ways to help your client win the uphill retail development battle

Paragon Outlets Livermore Valley Opens -- and Wins “New Retail Deal of the Year” Award

by Patty Blanquies

Since our last newsletter, Paragon Outlets Livermore Valley has had two notable milestones.

In March, the project and Hoge Fenton were recognized at the San Francisco Business Times “Real Estate Deals of the Year Awards” and given the “**New Retail**” award for 2012 in the Bay Area.



The shopping center opened in November -- after seven years of diligence on the part of the developers and legal team -- and with a very short construction time.

Kelvin Antill, one of Paragon’s main development partners, said, “We called it ‘Project Perseverance.’ We had to work tirelessly to get all the approvals we needed.”

Paragon was the third-largest U.S. retail project built in 2012. Hoge Fenton lead attorney Sblend Sblendorio said, “It has been kicking butt ever since it opened.”

Hoge Fenton team members on the project were Sblend Sblendorio, Rosie Gomes-Harr, Michael McSweeney, Ginger Thornell and John Hickey.



From left, Sblend Sblendorio (Hoge Fenton), Salem LaHood (Paragon Outlets LLC), Daniel Ballesteros (Hoge Fenton) and Kelvin Antill (Paragon Outlets LLC)

recent Hoge Fenton projects.

Complex Bi-County Transaction Closes with One Day to Spare

by *Steven D. Siner*

We represented the seller of multiple industrial and residential properties sitting on over 550 acres of farmland in Monterey and Santa Cruz counties. The sale price was \$9 million. The buyer, a commercial developer, intended to hold and then improve the property.

The transaction was notably complex in that the property straddled two counties and one of the commercial tenants had a right of first refusal that had a lengthy exercise time. In addition our client had an absolute year-end deadline to close.

We had to draft and record a well easement and maintenance agreement based on a legal description that was almost 100 years old with conflicting APNs. Because multiple buildings were sold, there were allocation issues and attendant tax considerations for both the buyer and seller that had to be addressed. At the same time the remaining agricultural land

was subject to Williamson Act applications in both counties.

With an absolute 12/31 deadline that couldn't be extended by even one day, juggling all these balls in the air at one time was certainly a challenge but we successfully closed with one day to spare.

Tenant-in-Common Buys Out Fellow Tenant-in-Common

by *Sean A. Cottle*

Attorneys David Mitchell and Sean Cottle and paralegal Ginger Thornell helped a longtime client buy his fellow tenant-in-common out of a high-rise, mixed use property in downtown Palo Alto in December 2012. The partners had owned the property together for over 40 years.

The Hoge Fenton team helped the client by assisting in negotiating and drafting the terms of the letter of intent and by drafting the purchase and sale agreement and other documentation throughout the transaction. The team also helped

the client create a new limited liability company (LLC) in order to transfer the client's interest in the property from his trust into the LLC before the seller sold his 50% percent interest to the LLC. The creation of the LLC and the transfer of the ownership interest from the trust to the LLC protected the client from adverse tax consequences.

Financing of Landmark Winery

by *Steven D. Siner*

We assisted in securing and collateralizing complex financing for the sale of a well-established Livermore Valley Winery that recently successfully closed escrow.

Because there was both institutional financing and seller carry-back financing, multiple issues had to be solved. Furthermore, there was a firm close of escrow date that could not be extended, requiring securing approval from multiple parties in a very short period of time.



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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...

Commercial/Retail Property in Vacaville

by *Sean A. Cottle*

In October 2012, Hoge Fenton assisted clients in acquiring a piece of commercial/retail investment property located in the Nut Tree area of Vacaville. The seller had two existing leases on the property that our clients assumed.

We participated in the transaction by reviewing, negotiating and revising the purchase and sale agreement and assisting the buyers and their team of real estate professionals throughout the due diligence process dealing with title, Conditions,

Covenants and Restrictions, and leasing issues.

After the transaction closed, the buyers' representative said that, "The work that went into making it all come together really took place in your hands. Will not forget the effort and professionalism I experienced in dealing with you."

Sale of "Old Mill" in Mountain View

by *Sblend A. Sblendorio*

We represented the Dymond Family in the sale of the well-known "Old Mill"

Mountain View office building. The Dymonds owned 50% of the building. Under an option agreement signed in early 2012, another co-owner exercised his option to purchase the Dymonds' interest and a third set of owners. The buyer acquired the sellers' interest and assumed an existing loan. The sale was contingent upon the loan assumption. The Old Mill is occupied by several tenants and numerous tenant estoppels were needed. As a result of the sale, the building was valued at about \$10 million. The Dymonds also held notes for money owed by buyer. These notes, by their terms, were payable upon sale and the notes were paid in full at the closing.

recent developments in case law.

Recent appellate court decision strengthened protections for consumers and licensed contractors

by Daniel Ballesteros and John Adams

A recent appellate court decision strengthened protections for consumers and licensed contractors while striking a blow against the once-iron-clad finality of arbitration awards.

In *Ahdout v. Hekmatjah*, the California Court of Appeal for the Second District held that courts may review arbitration awards when such awards are contrary to the protections of a well-defined public policy such as the Contractors State License Law (“CSLL”). Under most circumstances, arbitration awards are final and cannot be reviewed, even if the award is factually or legally incorrect on its face.

The CSLL prohibits unlicensed contractors from performing construction work for compensation. In order to protect the public, the CSLL provides harsh penalties for a contractor’s failure to maintain a valid license.

For example, if an unlicensed contractor

performs construction work, that contractor cannot sue his or her clients to collect payment for his or her work. Moreover, a contractor may be “deemed” unlicensed for a variety of reasons, including a failure to secure worker’s compensation insurance.

Additionally, any party who hires an unlicensed contractor may receive reimbursement for any compensation paid to the contractor, even if the hiring party knew the contractor was unlicensed. The unlicensed contractor cannot receive any offset for the value of material or services he or she provided.

In enacting the CSLL, the California Legislature intended to protect the public from dishonest and/or incompetent providers of construction services by ensuring that contractors possess certain levels of skill, knowledge, and character. It is this public policy that allows judicial review of certain arbitration awards.

Ordinarily, courts have very limited power to review arbitration awards. Because California has a strong public policy in favor of arbitration and providing finality to parties who engage in arbitration, it is

rare for a court to overturn an arbitration award. Generally a court cannot overturn an arbitrator’s award even if the arbitrator has made a mistake about the law or the facts of the case.

In *Ahdout*, the Court held that where an arbitration award violates a party’s statutory rights or a well-defined public policy, California courts must vacate the arbitrator’s award, reasoning that such “a clear expression of public policy” trumps the general rule that courts cannot review arbitration awards.

Where the Legislature expressly states a public policy, courts have the final word on whether the policy applies. *Ahdout* clarifies that such a situation arises when an arbitration award fails to return money paid to an unlicensed contractor.

What is unclear is in what other circumstances the reasoning of *Ahdout* may apply. Where an award violates a public policy or a party’s statutory rights, Courts may be poised to further expand the reviewability of arbitration awards.



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Neighbors and their trees -- a never-ending source of disputes

by Daniel W. Ballesteros

In *Kallis v. Sones* (2012), the Soneses were afraid that an Aleppo Pine tree growing on the property line they share with the Kallises could topple and cause damage to their property. The tree was 70 feet tall with one large “trunk” growing over the Kallis property and one over the Sones property.

Instead of trimming encroaching branches or other, less drastic measures, the Soneses hired workers to cut the tree all the way down to a stump, 41% of which

lay on the Kallis site and 59% on the Sones site.

Pursuant to Civil Code section 834, the Aleppo Pine was a “line tree,” straddling both properties. Accordingly, the Soneses argued, as they owned 59% of the tree, they should only be liable to the Kallises for the 41% that they owned.

The Court disagreed. It found that because they both owned an undivided interest in the tree, the wronged party was entitled to damages unreduced by the tortfeasor’s ownership interest.

The expert testified that based on a “trunk formula” the tree was worth approximately \$53,000. Pursuant to Civil Code section 3346, the amount of damages for injuries to trees, the amount was doubled. (It would have been tripled if wholly owned by the Kallises!)

The moral? Refrain from self-help remedies in neighbor disputes.

Downtown Real Estate Tour – It’s Baaaack!

by Grace Carr Lee

On May 2, 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.

Founded in 2003 by Hoge Fenton, Colliers International and the San Jose Downtown Association, this year’s Tour includes new steering committee member AEI Consultants.

Our popular event was on hiatus for several years because of challenging market factors. But, there has been a recent uptick in activity, and **San Jose was named a 2013 “Top 3 Market to Watch” by ULI/Price Waterhouse Coopers in Emerging Trends in Real Estate 2013** (click to read). With the pent-up interest and demand, we believe the time is right to get back on the bus.

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. Hope you will join us! For more information and to register, visit www.downtownsanjosetour.com.



inside Hoge Fenton.

Meet Dan Ballesteros. The spotlight of this edition of the newsletter is on Dan, a real estate trial lawyer who has spent his entire 23-year legal career at Hoge Fenton and currently serves as its managing shareholder. Dan has represented owners, developers, tenants and neighbors in all phases of ADR and litigation, through judgment at trial. He frequently represents brokers, sellers and buyers in cases involving non-disclosure issues in real estate sales transactions, and owners in cases involving partition, prescriptive easement, boundary line and other real estate-related disputes. Dan has also represented majority and minority interests in disputes involving governance and control of real estate LLCs and partnerships.

Dan has been recognized as one of Silicon Valley’s top real estate attorneys and is regularly named a Northern California Super Lawyer.

Dan is often asked to speak at state and local bar association events and has lectured on real estate-related topics to the brokerage community and at a local community college.



When he is not practicing law, Dan serves the community. He has proudly served on the Board of Trustees of the Mexican Heritage Corporation, a nonprofit organization committed to the celebration and preservation of the art and culture of Mexico and the host of the annual San Jose Mariachi Festival. Dan is currently on the board of the Silicon Valley Campaign for Legal Services. He has coached high school mock trials for 19 years, and counting. Dan can also be found, among other things, brewing beer with his family.



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