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Recent Items of Interest to Lenders, Developers and Others in the Real Estate Community

New laws affecting sale, leasing and financing of commercial real property

NEW PROVISIONS AFFECTING PROPERTY OWNERS

Two new laws imposing additional requirements on commercial property owners shortly take effect in California. The first, effective July 1, 2013, affects all commercial landlords (subject to the phase-in described below) and requires that all new commercial leases disclose whether the property has been inspected for compliance with disability access mandates and, if so inspected, whether the property passed the inspection. The second, effective September 1, 2013, requires owners of certain buildings to disclose specified information about a building's energy use to potential purchasers, lessees, and lenders, but only in transactions involving the entire building; the requirement initially applies only to buildings over 50,000 sf but, by July 1, 2014, will apply to all "nonresidential" buildings (as defined) over 5,000 sf. Each is discussed in turn, below.

Certified Access Inspections.

Starting July 1, 2013, under California Civil Code 1938[1]/, "every lease form or rental agreement" on a commercial property, executed on and after that date, must disclose to the tenant "whether the property being leased has had an inspection by a Certified Access Specialist." If the property has had such an inspection, the lease must also disclose "whether the property has or has not been determined to meet all applicable construction-related accessibility standards." If, however, the property does not meet all such standards, the law does not require the landlord to disclose what standards the property failed to meet. Whether the landlord chooses to disclose any shortcomings discovered will depend on a number of factors, including the nature of the shortcomings and individual tenant's bargaining power. We would note that there are no fines or penalties called out for failing to make the disclosure, but such failure would likely be noted in a subsequent disability access suit.

1. The text of the Section reads in full as follows: "A commercial property owner or lessor shall state on every lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a Certified Access Specialist (CASp), and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards pursuant to Section 55.53."

Unfortunately, Section 1938 does not define "commercial property" and the legislative history provides no clues. Industrial, office and retail are clearly included. There is a grey area, however, for apartment projects. We think, having discussed the question with the California Commission on Disability Access and the California Building Standards Department, that the law was not intended to apply to apartment projects, even if they have areas subject to ADA rules regarding public accommodation.

As noted, the law does not require landlords to have the inspections performed. Rather, landlords that have not had an inspection done can fully satisfy the law by adding to their lease forms a disclosure that no inspection has been conducted. Note, however, that the landlord may not know what the prior owners did, and will want to consider carefully when making representations what the prior owners did or didn't do. From a due diligence perspective in purchases on a going forward basis, information regarding previous inspections should be specifically requested and an attempt should be made to obtain a representation and warranty from the seller as to the issue.

If you are considering obtaining an inspection, you can follow this link for a list of Certified Access Specialists maintained by the California State government.

https://www.apps.dgs.ca.gov/casp/casp_certified_list.aspx

On a final note, this provision was part of a legislative effort to restrict disabled access lawsuits against commercial building owners for some construction-related accessibility claims. Among other things, the Legislature provided an incentive to carry out an inspection by a Certified Access Specialist: a landlord who passes such an inspection and thereafter is sued for a disability access violation would be liable for minimum statutory damages of $1,000 per day (for each violation) if it fixes the violation within sixty days. If the landlord has not done such an inspection, the landlord would be liable for minimum statutory damages of $4,000 per day (for each violation) if it fixes the violation within sixty days.[2]/

The upshot of all of this is that if you have not amended your commercial lease forms to reflect the new requirements, you should do so before entering into any new leases. If you need assistance in that regard, please let us know.

Energy Benchmark Requirements.

After years of delay, the California Energy Commission ("CEC") has finally promulgated regulations requiring that a non-residential building owner must disclose to the other party specified energy use documents, **before** (i) execution of a purchase and sale agreement, (ii) execution of a lease, or (iii) entry into a loan application for financing, involving an entire building of a certain size (as explained below). To do this, the owner must plan at least thirty

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2. The bill, SB 1186, Chapter 383, Statutes of 2012, is 41 pages long, detailed and beyond the scope of this update. If you get sued for a construction-related disabled access claim, you should contact an attorney.

(and probably more) days ahead. Specifically, the building owner must disclose the building's energy use and energy rating information by providing to the other party to the transaction a total of four documents, as obtained through the US EPA's online Energy Star Portfolio Manager.[3/] The start-up date for the program has been extended more than once – most recently from July 1, 2013, to September 1, 2013.

At least 30 days before the triggering event, a building owner (subject to the phase in dates set forth below) must open an account at the EPA's Energy Star program Portfolio Manager website and provide detailed energy information about the property for the previous 12 months. After all the information is provided, four documents are generated: (1) Statement of Energy Performance (showing the building's energy usage); (2) the Data Checklist (summarizing the building's physical and operating characteristics); (3) the Facility Summary (summarizing the above data and comparing historical building usage); and (4) the CEC's Disclosure Summary Sheet. (The form documents are located at: http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager.)

As part of the registration process, the owner may request its utility company and/or energy providers to upload, directly to the building's Portfolio Manager account, the building's utility data for the most recent 12 month period. Alternatively, the owner may upload the information itself. If the owner makes the request to utility companies, the information must be provided within 30 days after the owner's request.

IMPORTANT: Though the regulations apply to all "nonresidential buildings," that term is defined more narrowly than one might expect – it does not include apartment buildings and does not include most manufacturing and industrial uses (although it does include storage, research and development and certain other uses often found in industrial buildings). [4/] Moreover, the CEC's responses to comments to the regulations state that "mixed use" (i.e., residential and nonresidential) buildings are not subject to the regulations. Thus, a building that is part "nonresidential" (e.g., storage) and part not (e.g., manufacturing) may not be subject to the regulations at all. Nevertheless, because it's a grey area, it may still be prudent to comply with the regulations for sales, leases and refinancings occurring after the applicable trigger date, with respect to such buildings, depending on the cost of compliance.

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3. The regulations add a new Article 9 to Title 20, Division 2, Chapter 4 of the California Code of Regulations, and can be found at: http://weblinks.westlaw.com/result/default.aspx?db=CA-ADC-WEB&docname=PRT%28I30D929A0ADF411E287ECC945A606C4EB%29+%26+BEG-DATE%28%3C%3D06%2F14%2F2013%29+%26+END-DATE%28%3E%3D06%2F14%2F2013%29+%25+CI%28REFS+%28DISP+%2F2+TABLE%29+%28MISC+%2F2+TABLE%29%29&findtype=l&fn=_top&jh=Article+9.+Nonresidential+Building+Benchmarking+and+Disclosure+%28Refs+%26+Annos%29&jl=1&jo=20%2BCA%2BADC%2B%25c2%25a7%2B1680&ordoc=I30D90290ADF411E287ECC945A606C4EB&pbc=DA010192&rlt=CLID_FQRLT898850215146&rp=%2FSearch%2Fdefault.wl&rs=WEBL13.04&service=Find&spa=CCR-1000&sr=SB&vr=2.0 .

4. Specifically, the regulations define "nonresidential buildings" as including only the following occupancy types under the California Building Code: A (Assembly), B (Business), E (Educational), I-1 and I-2 (Institutional), M (Mercantile), R-1 (Residential – "transient," i.e. hotel/motel), S (Storage) and U (Utility, including parking garages). Among the classes omitted were F (Factory), H (Hazardous) and R-2 (Apartments).

The compliance deadline depends on the "total floor area" of each commercial or industrial building, as follows:

- Total gross floor area more than 50,000 square feet: compliance required starting September 1, 2013.
- Total gross floor area more than 10,000 square feet and up to 50,000 square feet: compliance required starting January 1, 2014.
- Total gross floor area 5,000 to 10,000 square feet: compliance required starting July 1, 2014.
- Total gross floor area under 5,000: no compliance required under current law.

Given the lead time, many property owners will elect to set up their Portfolio Manager account now, rather than risking delay in a subsequent transaction (note: the EPA Portfolio Manager website will be out of commission from June 24 through July 9, to upgrade the system). When providing the documents, as they must be delivered before the actual agreement is executed, owners may want to include in their (generally non-binding) letters of intent both an acknowledgement of receipt of the documents and a binding confidentiality agreement as to the information in the documents (as well as any other diligence documents disclosed at the same time).

If you have questions or need assistance with these or other California real estate matters, please contact the firm.

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