

The MORASS is Always GREENER

Real estate markets are in turmoil, but new laws that focus on green grass and greenbacks leave plenty for attorneys to do.

By David E. Harris
SPECIAL TO THE RECORDER

Green is the trend for both old and new real estate law. The Legislature has enacted new legislation directed at energy conservation and reduction of toxic materials, while litigation is likely to be spawned by a more familiar shade of green — money — as some parties face the realization the real estate deal they entered into just months ago no longer makes economic sense.

LITIGATION TRENDS

Litigation is a common byproduct of real estate deals gone bad, particularly when the deal occurs during a downturn in the market. There were plenty of lawsuits even when the market was hot. During the boom, developers tied up oceans of raw land, usually through options or long-term purchase contracts, neither of which obligated the developer to purchase unless and until the recordation of a tentative map or other entitlements.

In some cases, sellers who sometimes watched the value of the land double or triple during the life of the contract would discover "breaches" of the subject contract and assert that they were no longer obligated to complete the sale, sometimes leading to a renegotiation of the purchase price.

It seems likely in the current market developers and other purchasers will discover similar "breaches" and claim they are entitled to a refund of deposit. If anything, litigation seems much more likely now, because at least during the boom everyone was making money.

The subprime mortgage meltdown almost will certainly lead to litigation of every permutation imaginable. Banks will insist that mortgage brokers are obligated to repurchase loans, or compensate them for losses in the foreclosure process. Mortgage brokers will point to the borrower for providing false or incomplete financial information, and borrowers will point to banks and brokers for misleading them on the original loans. Appraisers and ratings agencies may face claims for negligence or even conspiracy. The credit crunch may result in claims for damages when a prospective buyer loses a purchase because a lender reneges on loan approvals and could even lead to claims for discriminatory lending practices.

In the landlord/tenant arena, the court in *McClain v. Octagon Plaza, LLC*, WL 257231 (2008),

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held that a lease provision stating square footage was an approximation and that the tenant would perform its own investigation, did not preclude a cause of action for fraud.

The plaintiff alleged the landlord misrepresented both the leased and common areas, causing over-contribution by the tenant to common area maintenance expenses. The court held that the plaintiff stated a cause of action for both intentional and negligent misrepresentation. The provisions at issue are "standard." Owners as well as brokers would seem to face exposure any time the square footage recited in the lease is materially different from the actual leased premises.

NEW LEGISLATION

Recent legislation has reflected a growing emphasis on environmental considerations. For ex-

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ample, SB 97, which requires the Office of Planning and Research to develop guidelines for the mitigation of greenhouse gas emissions, demonstrates the likelihood that such emissions will be a necessary component of CEQA analysis for future projects.

Existing law requires that recycled water be used for toilet and urinal flushing, if available; AB 1406 authorizes public agency to require such use for condominiums in some instances, and allows such use in others. AB 1103 is intended to motivate owners of nonresidential buildings to reduce energy consumption, requiring utilities to maintain energy consumption records and requiring owners to disclose the information to lessees, buyers and lenders.

AB 800 provides that when a party gives notice of a discharge of hazardous materials into U.S. waters, under the Porter-Cologne Water Control

Act, the party is not relieved of the obligation to notify local authorities.

A host of bills (AB 5, SB 5, AB 70, AB 156, AB 162) tackle flood control, including mandatory revisions of general plans and restrictions on development in the Central Valley. AB 70 exposes the local agency to liability from flooding damages for unreasonable approval of a development.

Other, nonenvironmental legislation includes:

■ AB 804, which allows escrow agents to charge a fee if escrow does not close within two months of the original closing date, or, under certain conditions, if escrow is cancelled

■ SB 976, which specifies that landlords may not use immigration status as a basis to terminate a tenancy, and precludes local agencies from requiring landlords to gather immigration status information

■ AB 1013, which enables landlords to evict tenants for the possession or use of illegal firearms, making clear that such possession or use is a nuisance

■ SB 223 toughens restrictions on appraisers. Existing law precludes appraisers from performing their services if their compensation is tied to real estate commissions in the purchase or sale of real property. SB 223 additionally applies the restriction in the development or financing of real property. It also precludes improper influencing of appraisers by anyone with an interest in the transaction.

■ AB 840 expands the real estate commissioner's authority to discipline licensees. Previously, a license could be revoked or suspended for a crime involving "moral turpitude." AB 840 allows suspension or revocation if the crime is "substantially related" to the duties and obligations of a licensee.

■ AB 763 clarifies notice requirements to tenants in the conversion of apartments to condominiums, including the requirement that the notice must be in Spanish, Chinese, Vietnamese, Korean or Tagalog if the lease was negotiated in one of those languages.

■ AB 354 allows the registrar of contractors to order payment of money to an injured party by a licensed contractor who allows an unlicensed contractor to use the license, or otherwise helps the unlicensed contractor evade the law.

New legislation, coupled with an increasingly volatile market, create particular challenges for both real estate professionals and attorneys in the coming year, but also will provide opportunities for development of new practice areas and expertise. As economic pressures increase, clients are likely to emphasize cost-effective dispute resolution and business-oriented solutions to legal issues. ♦