

Property & Construction Law: Attorneys see room for work outs on stressed commercial property

Posted By [D. Ashley Furness, Business Journal Staff Reporter](#) On July 30, 2009 @ 6:09 am In [Commercial Real Estate](#), [Construction](#), [Industry News](#), [Law](#) | [No Comments](#)

The recent residential mortgage meltdown has without a doubt been one of the most rigorous trials of the legal rights and constraints involved in the foreclosure process. Now with the second coming of the real estate slump expected in the commercial landscape, local attorneys expect a similar law testing ground, though perhaps more uncharted.

Jeremy Olssan

"The wave of questions has yet to come for commercial," said **Perry, Johnson, Anderson, Miller & Moskowitz** partner **Jeremy Olssan**.

"The issues of foreclosure for commercial and residential are very similar but with very different protections."

The trustee's sale of the **Marin Commons** project, one of the North Bay's largest commercial properties, is just one sign that the commercial real estate industry is under stress. An estimated \$165 billion in commercial loans are expected to mature this year, according to industry analyst **First American Core Logic**, and apartment and office vacancies and retail failures have breached record highs.

Though the North Bay commercial real estate industry has experienced downturns before during the dot-com bust, for example, the lack of collateral to back up loans today points to a higher possibility of foreclosures. Local legal experts said though much has been learned by the recent rush of loan work outs in residential, business investors have less protection against recourse from lenders but are perhaps in a better position to negotiate with the bank.

Mr. Olssan said though only about 10 percent to 15 percent of short sale agreements are approved for residential homes, the opportunity might be greater for commercial property owners as banks might be more apt to work out a sale rather than have vacant commercial property on their hands.

These arrangements tend to be much more complicated for business real estate, but it can be advantageous because it opens up negotiations concerning owing a deficiency, or the difference between what is owed on the loan and the value of the property. Unlike residential borrowers who are well-protected against deficiency judgments in California, business investors more often than not will owe.

In a bank's efforts to get rid of the bad loan and avoid litigation, it might be more willing to work with borrowers, experts said.

Clay Clement

"Banks are under enormous pressure right now to get these bad real estate loans off the books, so now is a real opportunity for borrowers to work out compromises with lenders that in normal economic times wouldn't be possible," said **Clement, Fitzpatrick & Kenworthy** partner **Clay Clement**.

Mr. Clement also said investors with personal guarantees on commercial loans could find more anti-deficiency protection in the case of a default on a loan. In situations where the LLC assets are the same as the individuals, they may be protected in the same way as a home borrower.

"It seems if the banks were acting in their own self interest they wouldn't want to flood the market and further depress prices," said **Coombs & Dunlap** attorney **Elizabeth Mackenzie**.

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The **California Natural Resources Agency** opened up comment on proposed climate protection amendments to the California Environmental Quality Act guidelines early last month and will accept

submissions through Aug. 20.

The **Office of Planning and Research** proposed the changes in April that were required as part of Senate Bill 97. The amendments would require a lead agency to take into account greenhouse gas emissions when examining the environmental impacts of a proposed project. The rule changes do not specifically detail climate impact mitigation measures, but they do list broad categories that could be used.

The natural resources agency must adopt the climate change guidelines by Jan. 1, 2010.

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Gov. Arnold Schwarzenegger signed recently an urgency bill that takes effect immediately and extends expiring subdivision maps for an additional two years.

Assembly Bill 333 introduced in January is meant to keep some construction projects moving by giving developers more time to complete their projects.

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