

SELLER DISCLOSURE STATUTE NOW APPLIES TO COMMERCIAL PROPERTY

By Tim Giacometti, Bullivant Houser Bailey PC



Commercial property sellers always want to limit their liability post-closing, especially when faced with lower property values as they are today.

But doing so has been more difficult since June 2010 when the Substitute Senate Bill 6749 became effective.

That bill expanded the seller disclosure statute (RCW 64.06), which requires residential property sellers to provide buyers with a disclosure statement (commonly referred to as NWMLS Form 17), so as to apply to commercial property sales. Under the statute, a buyer may back out of a purchase within 3 business days of receiving the completed statement.

It's hard to see how this expansion is of benefit to commercial owners and investors, who are as a general matter far more sophisticated in real estate matters than are homeowners. Commercial property investors perform due diligence and negotiate representations and warranties tailored to the transaction – and commercial property sellers are well aware of “AS IS” language. So, to the contrary, the statute amendment muddies the water.

That's because case law governing post-closing claims by disgruntled homebuyers against sellers may now be relevant to commercial property transactions. Most residential buyers and sellers do not negotiate reps and warranties concerning the property. So such claims have been largely based on the seller's responses in the disclosure statement.

For example, a buyer might claim that the seller should have known about prior water

leaks even if the seller did not actually know about them. And these claims proceeded, notwithstanding language in the statute providing that the “seller disclosure statement shall be for disclosure only, and shall not be considered part of any written agreement between the buyer and seller.”

Sellers obtained some relief under a 2007 Washington Supreme Court decision (*Alejandro v. Bull*), in which the court rejected negligent misrepresentation claims based on the infamous “economic loss rule”(ELR).

The ELR is a legal rule that prohibits parties to a contract from asserting certain tort claims (e.g., negligence) against each other. Alas, a pending case (*Jackowski v. Borchelt*) may open a way around the ELR. Meanwhile, in a decision just issued (*Eastwood v. Horse Harbor Foundation*), the Supreme Court replaced the ELR with the “independent loss rule”. In short, it appears that buyers can once again bring negligent misrepresentation claims against sellers based on the disclosure statement.

In light of this, a commercial property seller's likely first instinct would be to seek the buyer's waiver of its right to receive a disclosure statement. That will go only so far because the statute does not allow a buyer to waive receipt of the “Environmental” section of the statement if any of the seller's answers to questions in it are “yes”.

Those questions are broadly stated (e.g., “Are there any substances . . . that may be environmental concerns?”). So in addition to reps and warranties in the purchase agreement, commercial sellers will need to give special attention to their disclosure statement answers. Is a truly “AS IS” sale possible any more?

2011 SESSION NAIOP PRIORITY

By Greg Hanon, NAIOP State Lobbyist

NAIOP's primary legislative goal for the 2011 session is to implement Tax Increment Financing (TIF) in Washington. Washington State is one of only two states that do not have this valuable infrastructure financing tool.

In 2011, NAIOP will join with cities, counties, other business organizations and the environmental community to form a coalition that will focus on passage of legislation authorizing TIF. The coalition is called the Jobs and Investment Act Coalition and includes as many as 50 organizations united in this message.

In addition to passing legislation, a constitutional amendment will also be necessary. This requires a 2/3 vote of the legislature, and a vote of the people at the ballot. If we are successful in the legislature, the next phase will be a ballot measure campaign in the summer and fall of 2011.

2010 ELECTION RECOUNT RESULTS

By Greg Hanon, NAIOP State Lobbyist

Three weeks after the November General Election, four state legislative races went to a recount, one a hand recount. In the end, Republicans prevailed in each of the close races.

The final election results mean that Republicans picked up 4 seats in the Senate (27-22) and 5 seats in the House (56-42). Legislative leadership remains the same in all four caucuses. (Frank Chopp; Speaker, Lisa Brown; Senate Majority Leader, Mike Hewitt; Senate Minority Leader, Richard DeBolt; House Minority Leader)

The 2011 legislative session begins on January 10 for a 105-day legislative session.