

THE Registry™

BAY AREA REAL ESTATE JOURNAL

MAY 2009

BAY AREA
DEVELOPMENT

Looking Forward, Looking Back

Bay Area's cities chase redevelopment opportunities

- ▶ Oakland waterfront will soon have a developer
- ▶ Without Pier 70 in San Francisco
- ▶ San Jose hopes its airport remake will fly

pg. 12

Handsomely Rewarded

Needy landlords offer pricey perks to commercial brokers

pg. 6

Project FROG

Architect uses design to give education the jump

pg. 18

Mills Act

Grinding through historic preservation in San Francisco

pg. 22

Final Offer | Diane Filippi

SPUR's fresh new digs

pg. 36



Mission Statement

The Registry is a real estate journal that aspires to fulfill the need of Bay Area professionals for accurate, unbiased and timely news, analysis and information.

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CORRECTION

In the April issue that listed the IIDA-NC Honor Awards winners, in the Work Big Notable category we referred to one of the design team members as Lucas Brown. His name should have read Lucas Martin.

Contributors



Rob La Eace
The Market About...
Nothing! pg. 28

Responding to emergencies as a firefighter in a variety of uncertain situations and diverse neighborhoods taught Rob La Eace a lot about how people should be treated, not only during a crisis, but also in everyday problems. Today, these same skills are an asset to those who work with this San Francisco native in his career as a broker associate with McGuire Real Estate. The tools he puts to work as a firefighter are what makes the difference to the clients Rob works with as an agent. While it may help that Rob is the type of guy with a warm smile and a friendly attitude, his professionalism, organization and drive to succeed are what make him stand out in his career. Working in his fifth year in the industry, Rob is in touch with his clients' needs and with the city—putting a local's perspective to work.



Jill Pilaroscia
Colorful Character,
pg. 26

Jill Pilaroscia has been an international color consultant since 1984. She earned her bachelor of fine arts degree from the San Francisco Art Institute and is an accredited member of the International Association of Color Consultants. She has been a consultant for multiple high-profile projects across the Bay Area including China Basin biotech offices in Mission Bay for McCarthy Cook & Co. and RREEF Alternative Investments; Marin Commons, a San Rafael office campus owned by the Hines company, a developer and property manager; Aventino Apartments in Los Gatos for The Sobrato Organization, a South Bay office and apartment owner; and Emeryville's Bay Street townhomes for Regis Homes of Northern California. Her firm recorded sales of \$650,000 last year and has four employees.



Scott D. Rogers
Smoking Gun,
pg. 25

Scott D. Rogers is a senior partner in the Real Estate, Development, Land Use and Finance Group of Holme Roberts & Owen LLP. His practice focuses on representing institutional and private real estate investors in all aspects of real estate equity and finance transactions. He obtained his bachelor's degree in economics from the University of California, Irvine, and his law degree and master's of business administration from the University of California, Los Angeles. He is chair of the Executive Committee of the Real Property Section of the State Bar of California.



Tay C. Via
Carbon Caps Land,
pg. 20

Tay C. Via is a partner with San Francisco law firm Coblenz, Patch, Duffy & Bass LLP. She specializes in land use and development, with particular emphasis on large public/private projects, including the San Francisco Giants' ballpark, the 303-acre Mission Bay development, Westfield San Francisco Centre and the Academy of Sciences' internationally renowned new LEED platinum museum. Via chairs her firm's Renewable Energy and Climate Change practice and also serves as co-chair of the SB 375 Task Force for the San Francisco Planning and Urban Research Association (SPUR). She is listed in BestLawyers in America for her expertise in land use and zoning. ■

Smoking Gun

Property owners fear liability for harm caused by common-area smoking regulations.

By **Scott D. Rogers**

A California appellate-court ruling has opened the path for commercial property owners of all stripes to find themselves liable for second-hand smoke puffed in their buildings' common areas.

The case, *Birke v. Oakwood Worldwide*, began when an apartment resident, Birke, sued a property owner, Oakwood, because smoking was permitted in the outdoor common areas of the apartment complex in which Birke lived.

Oakwood owns and operates an apartment complex in which Birke, a 5-year-old girl, and her parents reside. Oakwood prohibits smoking in all indoor apartment units and indoor common areas but allows smoking in areas around the barbecue, pool, playground and other outdoor common space where it also provides ashtrays and permits its own employees to smoke.

Oakwood is alleged to have made a business decision to allow smoking in hopes of attracting international tenants.

Further, Oakwood declined Birke's repeated requests to ban smoking in the outdoor common areas because she suffered allergic reactions from asthma and three bouts of pneumonia, presumably as a result of her exposure to the second-hand smoke.

After reviewing the facts and the legal arguments made in the case, the trial court determined that Birke lacked sufficient legal grounds to support an action against Oakwood and ruled in Oakwood's favor. On review, however, the California Court of Appeal reversed the trial court and determined that the facts as pleaded by Birke were sufficient to support a public nuisance cause.

The appellate court expressly refrained from commenting on the merits of the factual allegations or the potential difficulties in proof, leaving these issues to the trial court and many questions unanswered for the commercial real estate community.

The appellate court opined that to adequately plead a cause of action for public nuisance based on second-hand smoke in an apartment's common areas, seven factors had to be present. For instance, the apartment had to be managed in such a way that it created unhealthy

conditions and prevented people from using the common space as they chose. The conditions also had to affect substantial numbers of people at the same time, and an ordinary person would have to be reasonably bothered. There also had to be a substantial cause of the alleged harm, and the harm itself had to be different from that suffered by the public at large.

The appellate court found that each of the required elements of the cause of action had been adequately pled. In particular, the court held that the aggravation of Birke's allergies and chronic asthma was different in type from the harm to the general public of increased risk of developing heart and lung cancer. The court also suggested that where the injury is a private nuisance as well as a public nuisance, the special injury requirement is inapplicable. The court further found that Oakwood's alleged conduct in permitting the smoking in the common areas, providing ashtrays and refusing Birke's request to ban smoking was sufficient to support the nuisance claim.

The case now goes back to the trial court for a determination on its merits. The cost of prosecuting and defending the action will be substantial, since the various factual and medical issues will be complex and contested.

Regardless of what happens at the trial court level in this case, however, the appellate opinion provides a roadmap to other potential plaintiffs and their counsel. Consequently, it seems reasonable to expect that numerous legal actions throughout California will be filed against apartment owners and managers based upon similar allegations.

Apartment owners and managers, however, are not the only likely targets. The same allegations can be made with respect to office buildings, shopping centers, resort properties and virtually any other real property occupied by multiple persons for extended periods or on a regular basis. The pathway has been created to test new legal theories, and the consequences could be far-reaching and significant. ■

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