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

New laws on foreclosures, deficiency judgments, real estate brokers / licensees, tenant notices, & note sales

The California Legislature adopted (and the Governor approved) over 800 new laws last year. Below are brief discussions of a few of the new laws that became effective in California on January 1, 2013 (unless a later date is noted below), that we think may be relevant to your real estate / finance business.

- 1. Real Estate Licensees; Credit for Education (B&P Code §10150.6); Suspensions - AB 1718 (Chapter 193), SB 875 (Chapter 380).** Under the law prior to January 1, 2013, a person who passed the written exam could qualify for a real estate broker's license if the person had two years of "general real estate experience," which could be satisfied (in lieu of two years of general real estate experience) if that person graduated from a four-year university program that included a "specialization" in real estate. AB 1718 ratchets up this requirement by specifying that the two years of experience may be satisfied by a college degree only if the "course of study included a major or minor in real estate." So long as you submitted your application prior to the effective date of this law, you will not be subject to the new requirements. In addition, SB 875 makes a number of changes relating to the admission and suspension of real estate licensees. For example, if the DRE suspends a licensee for having been convicted of a crime involving dishonesty, fraud or deceit, he or she may not act as a broker or salesperson for up to 36 months; SB 875 adds that the licensee also may not participate in an examination for licensure during that period.
- 2. Deficiency Judgments on Refinanced Purchase Money Loans (Code Civ. Proc. §580b(c)) - SB 1069 (Chapter 64).** Under the law prior to January 1, 2013, a lender could not obtain a deficiency judgment against a borrower in connection with a loan made to a borrower for the purchase of a residence (1-4 unit owner-occupied property), or with respect to any real property (residential or commercial) if the seller made a loan to the buyer of the property to finance the acquisition in whole or part (i.e.: where a seller takes back paper, or a lender finances a purchase of its REO by a buyer). SB 1069 expands the "purchase money" loan prohibition on deficiency judgments with respect to loans made or refinanced after January 1, 2013 to the extent the refinance is of a purchase money loan (and any subsequent refinancing, ad infinitum). The limitation does not apply to new advances beyond the amounts needed to repay the existing purchase money loan plus refinancing costs. Thus, if you make a residential loan on a 1-4 unit owner occupied property, or sell any real property (including non-residential property) and carry back financing on it, any subsequent refinancing of that loan (by the same or a different lender) will retain the "purchase money" status - meaning that you will not be able to obtain a deficiency judgment from the borrower (with certain judicially-created exceptions for waste and for "non-standard" transactions such as construction loans, which should not be affected by the new law). Similarly, if you refinance a purchase money loan, the anti-deficiency protections will

apply. Note that this is separate from the other "anti-deficiency" laws, such as §580d, which generally prohibits a deficiency judgment following a non-judicial foreclosure (trustee's sale). The law appears (although this could well end up in litigation) to provide that a refinance after January 1, 2013, of a previously refinanced purchase money loan would become once again a purchase money loan, although the previous refinance would not have been considered a purchase money loan at the time it was made. This could provide an incentive for owners to refinance both commercial and residential properties in order to obtain deficiency protection.

3. **Foreclosed Residential Property (Civil Code §2929.3, H&S Code §§ 17980, 17980.7) - AB 2314 (Chapter 201).** Existing law, which was set to expire January 1, 2013, allows local agencies to fine an owner of a foreclosed residential property (apparently including multi-family projects) up to \$1000 per day for failing to maintain the property. AB 2314 removes the "sunset" provision (thereby extending the law indefinitely), but specifies that the owner cannot be fined during the first 60 days after acquiring the property, so long as it is diligently proceeding to remedy any violations. Under existing law, if an owner fails to comply within a reasonable time, the local agency may seek a court-appointed receiver; this bill expressly allows the court to assess all costs of the receivership upon the property owner.
4. **Real Estate Investments (B&P Code §§10232.3, 10232.45, 10232.5; Corp. Code §§25102, 25102.2, 25113) - SB 978 (Chapter 669).** This law establishes a number of new requirements relating to the sale of (or offer to sell) all or a portion of a note secured by one or more real properties (both commercial and residential). Among other things, it requires that a broker arranging a loan funded by one or more investors must ensure that the loan does not exceed a specified loan-to-value ratio (anywhere from 35%-80%, depending on the type of property, subject to certain adjustments), and that interests in such a loan may not be sold, unless the real estate broker soliciting the investor ensures that the investor meets specified net worth and/or income requirements. It also requires every real estate broker that solicits investors for privately-funded loans to make reasonable efforts to ensure that the investors meet certain requirements, including "the capacity to understand the fundamental aspects of the investment," that they "can bear the economic risk of the investment," and that the "investment in the security is suitable and appropriate for each purchaser." In the alternative, the broker may obtain and submit to the Department of Corporations a completed questionnaire in a form that has now been promulgated by the Department (http://www.corp.ca.gov/Laws/CSL/pdf/SB978_12-12.pdf).
5. **Common Interest Developments (Civil Code §2924.1) - AB 2273 (Chapter 255).** Requires a trustee's deed for a property located within a common interest development (which includes commercial condominium projects) to be recorded within thirty (30) days after the sale. Note that current law provides a huge incentive to record a trustee's deed within fifteen (15) days (the sale is perfected as of the sale date only if the deed is recorded within such period), so that if you use an experienced trustee, this situation should not arise.
6. **Document Recording Fees (Government Code §27388) - SB 1342 (Chapter 104).** Under the law prior until January 1, 2013, counties were entitled to impose (in addition to all other fees) a fee of up to \$3 on the recording of every "real estate instrument", which included deeds of trust, notices of default and notices of sale. SB 1342 increases the maximum fee allowable to \$10, and substantially expands the list of documents considered a real estate instrument, to include CC&Rs, easements, leases, mechanics lien notices, and deed of trust modifications. In addition, while existing law exempts from the fee any document subject to the documentary transfer tax, the amendment exempts all documents "recorded in connection with a transfer" subject to the documentary transfer tax. This would appear to remove deeds of trust and other documents recorded in connection with a sale from the additional fee.
7. **Non-Judicial Foreclosures (multiple code sections) - AB 278/ SB 900 (Chapters 86, 87).** As might be expected, a number of new laws, including these two statutes, enacted new and more burdensome

restrictions and requirements, largely applying solely to non-judicial foreclosures of residential property (if you are contemplating doing a residential foreclosure, you will want to have an attorney review carefully all of the new provisions). However, a few of its provisions apply to both commercial and residential non-judicial foreclosures. Thus, it specifies that no entity may initiate the foreclosure process unless it is the holder (or impliedly the agent of the holder) of the beneficial interest under the deed of trust, and no agent of the holder may commence the process except when acting within the scope of its authority. In addition, the new law requires a "mortgage servicer" (which includes a lender servicing its own loan) to "ensure" that it "has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." Expect the foreclosing trustee to require the lender to certify to the foregoing prior to initiating the Notice of Default.

8. **Foreclosed Residential Property (Civil Code §2924.8, Code Civ. Proc. § 1161b) - AB 2610 (Chapter 201).** Existing state law, which was set to expire January 1, 2013, requires the successful purchaser at a foreclosure sale to give at least sixty (60) days' notice before terminating a month-to-month residential tenancy or residential lease (except as provided). This provision was made largely irrelevant as to a "federally-related mortgage loan" by a subsequent federal law requiring at least ninety (90) days' notice on such loans. Note that the federal law is set to expire December 31, 2014. AB 2610 (a) by contrast, extends California law through the end of 2019, (b) increases the notice period to ninety (90) days, (c) specifies that a foreclosing owner cannot terminate a residential lease at all during its term, except under specified circumstance (largely consistent with the existing federal law), and (d) expands the provisions of the notice to the tenant to be posted on a residential property following recordation of a Notice of Sale (although this posting provision will only take effect upon the later of March 1, 2013 or sixty (60) days after the Department of Consumer Affairs posts the amended notice language).
9. **Notarial Requirements (Gov. Code §8206) - AB 2326 (Chapter 202).** Under current law, a notary public must require a party signing a deed, quitclaim deed, deed of trust or a power of attorney to place his or her thumbprint in the notary public's official journal. AB 2326 expands this requirement to apply to all other documents affecting real property, except a trustee's deed resulting from a decree of foreclosure or a nonjudicial foreclosure, and a deed of reconveyance.
10. **New Multi-lingual Summary Notices on Notice of Default/Notice of Sale (Civil Code §2923.3) - AB 1599 (Chapter 556).** Under current law, the foreclosing trustee (or beneficiary) must timely mail a copy of the Notice of Default and Notice of Sale, in addition to recording the same. Starting April 1, 2013, the Legislature has added a new requirement with respect to foreclosure of residential real property containing no more than four dwelling units: you must attach to the Notice being mailed a Summary Notice in the form prescribed. Moreover, this Notice must be in six different languages: English, Spanish, Chinese, Tagalog, Vietnamese, and Korean. Note that this provision is not limited to owner-occupied properties. Expect this to further increase the cost of residential foreclosures. In accordance with the new law, the Department of Corporations has the multi-lingual forms here:

http://www.corp.ca.gov/Laws/Finance_Lenders/Forms.asp

Needless to say, the foregoing are only very brief summaries of these new laws, most of which are lengthy and complicated (and may be affected by other statutes and case law). In addition, while we have attempted to describe some of the more major changes relating to real estate laws, the list is not exhaustive. As a result, you should not rely on the foregoing as legal advice or as a legal opinion. To determine what the law means in the context of your circumstances requires an individualized legal analysis. If you have further questions or concerns about how any of these laws might affect you in your particular situation, or have any other legal questions, we would be happy to assist you.