

NEW LEASE ACCESSIBILITY INSPECTION DISCLOSURE REQUIREMENT (SB 1186 Leaves Unanswered Questions)

By Scott Rogers and Ted Klaassen

Senate Bill 1186 was recently enacted to reduce the mounting wave of accessibility lawsuits threatening to swamp the California courts and to encourage California businesses to better comply with the Americans With Disabilities Act and state accessibility laws. In addition to enacting detailed new requirements for attorneys dealing with construction-related accessibility claims and giving incentives to owners to comply with such accessibility standards, SB 1186 imposes a new disclosure obligation on commercial property owners and/or lessors.

SB 1186 adds new Civil Code Section 1938 which provides as follows:

“A commercial property owner or lessor shall state on every lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a Certified Access Specialist (CAsp), and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards pursuant to [Civil Code] Section 55.53.”

Note that SB 1186 is expressly not intended to require a property owner or lessor to hire a CAsp. However, the new disclosure requirement could create traps for unwary owners and lessors and may force some into obtaining a CAsp inspection.

Although the new requirement sounds simple enough, Section 1938 does not define “commercial property.” The definition may have been intended to be synonymous with “site,” which is defined in Civil Code Section 55.52(a)(9) as being a “place of public accommodation.” However, no cross-reference is made. Consequently, we are left to surmise the breadth of the application of the new requirement. Also note that no exemption is provided for short-term leases or rental agreements so that even month-to-month, or possibly transient, occupancy agreements would appear to be included.

Also uncertain is whether commercial property managers, as opposed to owners and lessors, are bound by the disclosure requirement. The use of the phrase “owner or lessor” suggests that someone other than the actual property owner who leases a commercial property will be obligated to comply. This makes sense in the case where the property or leasing manager leases or rents the property in its own name rather than in the name of the actual property owner. However, where the lease or rental agreement is in the name of the actual property owner and the disclosure is not made,

or is made incorrectly, it may be possible that the property or leasing manager who negotiates the lease also incurs liability for violation of the disclosure requirement.

In addition, the scope of an owner's or lessor's potential liability for violation of the disclosure requirement is unclear. Civil Code Section 1938 is completely silent in that regard. No guidance is provided as to whether the tenant will have an action for damages, the right to terminate the lease and/or some other remedy.

New Section 1938 is also silent as to whether the disclosure requirement applies in the absence of knowledge by an owner or lessor of any prior CASp inspection of the property. As the disclosure requirement does not afford an owner or lessor the option to qualify its disclosure as being to the best of its knowledge, it will be incumbent upon a property owner or lessor to determine whether a CASp inspection was previously made.

With regard to new acquisitions, this may complicate the due diligence process and/or require an additional representation or warranty. Where few, if any, representations or warranties are available and/or only incomplete property records can be accessed in the course of the buyer's due diligence (as is commonly the case in acquisitions from banks of recently foreclosed properties), the buyer may have no practical alternative than to obtain a CASp inspection. This may also be true with regard to an owner's or lessor's current property holdings as to which it may not know whether a CASp inspection was previously done.

In any event, it is certain that the addition of Civil Code Section 1938 will require that appropriate changes be made to all lease and rental forms for commercial properties in California. Care should be taken to assure that all lease and rental forms are updated prior to July 1, 2013, and that all leases and rental agreements drafted before July 1, 2013, but executed on or after that date include the required disclosure.

Owners and lessors of commercial property should consult with experienced real estate counsel to determine recommended approaches regarding (a) whether to obtain a CASp inspection; (b) how to address these unanswered questions and (c) how to modify their leases to comply with the new disclosure requirements.

If you would like further information, please contact your Rutan attorney.

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