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California Energy Commission
DOCKETED
14-EUDP-01
TN # 75277
MAR 02 2015

March 2, 2015

California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Docket Number: 14-EUDP-01
Comments on Staff Workshop AB1103

Dear Sir:

I would like to thank staff for an engaging workshop held on February 20, 2015. Staff comments were thoughtful and audience participation raised a number of issues to be explored. Since that workshop I have given some thought to a number of points raised and I would like to take this opportunity to give you my viewpoint. I will try to be concise.

Section 1681. Definitions.

I especially like provisions j) an l). I agree that only accepted purchasers and/or tenants should obtain the disclosures. Oftentimes a property may be on the market (whether for sale or lease) for many months. Multiple offers may be presented but may not be acceptable to the seller/landlord. For the seller/landlord to generate and issue disclosure statements before an offer is accepted is a procedure without benefit. Only the accepted offeror needs the information; otherwise, the requirement would generate action and expense without purpose.

Section 1682. Schedule of Implementation.

The exemption of buildings smaller than 10,000 square feet (c) is sensible. As staff acknowledges, such buildings make up a very small percentage of the commercial building stock in California. However, those building owners are generally less able or willing to comply. The range of energy improvements that a small building owner can afford to make given the return on investment makes significant improvements problematic. Increasing attic insulation, replacing old windows and installing new HVAC equipment can be a sizable investment that is not reflected in increased rents. Small building owners generally sell and lease to small buyers and tenants, who are more interested in price per square foot

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than energy performance. Small building tenants may lease the premises for less than five years, which does not give a small building landlord enough time to recover its costs.

I suggest that small building buyers and tenants are characteristically different than large building buyers and tenants, who, on the whole, are more sophisticated and better able to shoulder the temporary burden of energy improvements and gain long-term benefits.

Section 1683. Disclosures.

There was considerable discussion regarding the timing of disclosures in sales and lease transactions. After listening to the various comments, I neither think there is a perfect solution nor do I believe the commission has to be overly concerned as long as it builds flexibility into the requirements.

The proposed changes would require disclosure "three days after signing the . . . agreement" (§1683 a) (1) (2)). Some of the commentators were concerned that the utilities might not respond fast enough to enable a seller or lessor to meet this requirement. Someone made the suggestion that the words "or as soon as practicable" be added to provide flexibility.

That suggestion is not a bad idea; however, staff should consider the fundamentally different procedures inherent in the sale of property from the leasing of property. In a sale of real property, escrow is opened and administered by a neutral third party, generally a title company. Escrow may be open for 30, 60, 90 days or longer. Funding is always a major concern, but due diligence requirements must also be met or waived. Given the extended period of time for an escrow, does it matter that the buyer receives a disclosure three days after signing the purchase and sale agreement? True, it might be helpful for the buyer to have the disclosure in order to make comparisons, but under the proposed rules, he or she is already "in contract". The buyer's attorney or broker can and should make the purchases contingent on the buyer's approval of the disclosure. Between the buyer and seller, they can negotiate whether the disclosure period is within 30 or 60 days or longer. No matter what, a buyer and his or her representatives will be able to review the disclosure and reject the sale if the disclosure is unsatisfactory. It may be more likely that an unsatisfactory disclosure will lead to further negotiations between the two parties, either on price or improvements to be made prior to closing which will enhance the building's performance.

By allowing disclosure flexibility in the sale and purchase of commercial buildings, you allow the real estate and legal communities the ability to devise procedures and contract language that fit each particular transaction. You may simply wish to require that disclosures are made prior to the close of escrow. It will then be up to the parties to devise ways to obtain the information and protect their individual interests.

Commercial leasing, however, has no escrows, no third party neutrals. In large and complex single tenant transactions, the parties will generally be sophisticated and have able and sophisticated real estate professionals; in smaller and simpler lease situations the level of sophistication may be less. In larger single tenant leases the lease itself may be conditioned on the completion of Tenant Improvements (T.I.s) or other construction, zoning or other entitlements review, etc. Those conditions may be conditions precedent or conditions subsequent, but in either case, allow the tenant to back out

of the lease. The disclosure issue may be further complicated when an existing tenant is renewing a lease. There may be option periods wherein the tenant must notify the landlord, but there may not be. I mention these factors as just some of the many variables that can take place in commercial leasing. Add to the mix the very real concern expressed in the workshop of a third party utility's ability to respond in a timely manner, and it becomes clear that disclosure in commercial leasing is complicated.

I suggest that none of these variables have to be solved by staff. There is no set of rules that can be devised to handle the myriad conditions that occur in commercial real estate lease transactions. Perhaps the simplest rule is the best rule. Requiring disclosure within three days after signing a lease may be too inflexible, but requiring disclosure within three days of signing the lease if practicable would solve the problem of when the third party utility provided the information to the transacting parties. This, of course, would solve only part of the problem, as a tenant who signs a lease and then receives the disclosure might disapprove the findings in the report. Presumably his or her attorneys will have crafted lease language that would allow the dissatisfied tenant the right to terminate the lease. The important point is that the commercial real estate industry can adapt to the particular needs of the transaction and their clients. It is not necessary for staff to solve the problem.

I think it wise to provide a clear line, such as three days after signing the lease, but to also include some flexibility by adding language "or as soon as practicable" or similar language. Contracting parties can only guess as to how rapidly third parties will respond. They should not be penalized for guessing incorrectly when they do not control the actions of those third parties.

I would not worry about sellers or Lessors "gaming the system" by providing false information. The likelihood of some unscrupulous characters doing so is real - - in any group of people there will always be the dishonest ones - - but the number should be small and the legal community can devise protections. As an example, California law already provides that in every contract and lease there is implied the covenant of good faith and fair dealing. An aggrieved tenant or purchaser will have a cause of action against an unscrupulous seller/lessor. Law suits resulting in liability have a wonderful curative effect.

Section 1684 (b).

This provision providing for energy disclosures by utilities without requiring tenant consent is one of the most important and necessary revisions to make AB1103 work. Most retail and many office tenants contract directly with the companies that supply their utilities, meaning that building owners are not in "privity of contract" with the utility provider. They are strangers to the contract. Therefore, when an owner seeks to obtain energy information on their building they must obtain the consent of their tenant(s), which may not be forthcoming. Without this consent the owner's only avenue is to use a reasonable estimate. A reasonable estimate is only an educated guess, which, when submitted to the Energy Commission, provides less-than-accurate and unreliable information.

Requiring utility companies to provide energy consumption information without tenant involvement is critical; however, utilities have legitimate concerns regarding privacy. Aggregating usage of many tenants is helpful, but it does not address concerns for single occupancy buildings or buildings with only

a few tenants. Perhaps the best way of solving the privacy issue is to promote legislation that declares commercial energy usage to be a matter of statewide concern, which therefore does not involve privacy issues. Such legislation could further shield utility companies from lawsuits arising out of their compliance with AB1103 or similar programs. It may also be important for other regulatory agencies to promulgate specific regulations exempting utility companies from legal actions due to disclosure.

Section 1685. Exemption from Disclosure.

This is a common sense provision; however, it is ambiguous and not as far-reaching as it could be. The word “demolished” is not defined in Section 1681. One interpretation could be that the entire building is torn down. But does it apply when the building is gutted, leaving only the exterior walls? Should it apply if the parties contemplate significant remodeling of the space (50% or more)? Whether the building is totally demolished, partially demolished or a significant portion of the T.I. s are demolished, any rebuilding will have to be to current codes, including energy codes. In any of these scenarios, a prospective buyer or tenant will be interested in a building’s future performance, not its performance prior to demolition. A disclosure statement in these situations is meaningless. As such, I would suggest you add to Section 1681 a definition for demolition that includes not only total demotion but also significant remodeling

Thank you for the opportunity to comment on these proposed revisions of Sections 1680, et. al. I hope my comments are constructive. They are meant to be. Should you have any questions regarding anything I’ve stated in these comments, please feel free to contact me directly.

Very truly yours,

/S/ Timothy F. Cahill

Timothy F. Cahill
President