Rifkind Law Group 2015 Legal Update

I. November 2014 CAR Residential Purchase Agreement Update.

A. **Many revised provisions**. 24 of 32 sections in the contract have new language, involving time periods and new disclosures.
B. **Appraisal and Loan Contingency**. Appraisal contingency, Section 3I, and loan contingency, Section 3J are distinct and independent.
C. **Lender limits on buyer credits**. Section 3J5. Lenders often place limits on the amount of credits a buyer can receive and still qualify for the loan. This section provides all credits must be disclosed to the lender, whether from seller or agents. If the credit amount exceeds that allowed by the lender, then the excess will be disallowed by the contract. This provision assures seller the amount of credits given will not negatively impact buyer's ability to qualify for the loan.
D. **Allocation of Costs**. Section 7D4 is mandatory and requires seller to pay HOA fees for preparing documents required by to be delivered by Civil Code §§4525 *et seq*., e.g. CCR's, budgets, financial statements. Sell must deposit sufficient funds to escrow to cover this cost. All the other allocations of costs are negotiable.
E. **Leased or Liened Items and Systems**. In Section 8B4, Seller must disclose if any systems are leased or liened, e.g. solar systems, security systems, water softener systems, propane, including all related documents that show the term of lease, payments required, ability to assign. This Section 8B4 is a contingency of the agreement as provided in Section 14B.
F. **Fully Completed Statutory Disclosures by Both Seller and Listing Broker.** Section 10A1 and 10A2 provide that a buyer may rescind the contract until such all required statutory disclosures are completed by both seller and listing broker. This revision precludes buyer's broker from extending time for buyer to rescind because buyer's broker has not completed an AVID.
G. **Deposit Disputes.** Section 14G provides after cancellation, the party demanding the deposit can in writing make that demand to escrow with a copy to the other party. The other party has 10 days to object or escrow releases the deposit to the demanding party. If there is objection, the mutual escrow instructions are required.
H. **Scope of Broker's Duty.** Section 18B identifies areas outside the scope of broker's duty, e.g. what price buyer should pay or seller accept, condition of the property, adequacy of inspections, offsite inspections, defects on the property, public records, boundary lines, square footage, fair market value, legal or tax advice. Previously such information was provided in the Buyer Inspection Advisory. Now it is in the RPA, making these contractual terms affirmatively agreed upon by bother seller and buyer acknowledging the limitations of the broker's duties.
I. **Representative Capacity.** Residential properties are commonly owned or purchased by non-individuals: trusts, corporations, LLC's, LP's, or by persons with power of attorney. If signing in representative capacity for buyer, Section 31, or seller, Section 32, must check the box and attached

a Representative Capacity Signature Disclosure. Proof of representative capacity must be provided within three days, and thereafter signature or initial by the individual is deemed sufficient.

J. **Liquidated Damages.** Section 21A provides any added clause(s) added by the parties to penalize the buyer or reward the seller if the buyer does not perform may not be enforceable by the seller to recover liquidated damages.

K. **Assignment.** Section 26 provides a buyer may not assign without seller's express written consent. So inserting in the RPA the buyer, or assignee, as a party is insufficient. Need to use separate Assignment of Agreement Addendum, signed by the seller to properly assign the contract. Further, even on assignment, buyer is not relieved of liability under the RPA and unless the seller expressly releases buyer from liability.

L. **Commission Disputes.** Generally there is no issue regarding the sharing of a commission when both brokers are members of the MLS. Sometimes, the property is a pocket listing, or not on MLS, or one broker is not a member of MLS and commission disputes can arise. See page 10, paragraph D in the Real Estate Broker section that requires the brokers enter into a written Cooperating Broker Compensation Agreement for a commission sharing agreement to be enforceable.

II. Ross Valley Sanitary District Private Sewer Lateral Program

RVSD has enacted an ordinance establishing a program to repair or replace failing private sewer laterals affecting: Fairfax, San Anselmo, Ross, Larkspur, Bon Air, Sleepy Hollow, Kentfield, Kent Woodlands, Oak Manor, Greenbrae and Murray Park, triggered by remodeling projects in excess of $75K or remodel projects that include a bathroom, or the *sale* of real property, including single family, commercial, multi-family units, and condos, effective January 1, 2015. Properties in escrow prior to January 1 are exempt. Other exemptions include installed laterals permitted and inspected within the last 20 years, or passing a recent pressure test approved by the District Engineer. No shared laterals will be approved. Inspections will take up to two weeks, and replacements can take typically 30 days. The ordinance allows compliance up to 60 days after COE.

III. Forms:

A. Commercial Real Estate Disclosure Form
B. Copyright License For Photos/Video Required by BAREIS/MLS

Forms are available at www.propubforms.com

IV. 2015 Statutes

Broker/Agent Contact Information. Agent and Broker must provide the BRE with current telephone number, email address and office or mailing address used for license activity and update same within 30 days of any changes. Bus. & Prof. Code §§10150, 10151, 10162, 10165.1. Effective. 1/1/15.

Records. Existing law requires a broker to maintain all transaction records for three years. Texts, instant messages, tweets and other "ephemeral nature" messages are excluded. Emails are *in*cluded as part of transaction records. Bus. & Prof. Code §10148. Effective 1/1/15.

Team Names. Use of team names is now permitted by statute. Previously, it was permitted through a BRE regulation. Use of a team name no longer requires the broker to apply to the BRE for a separate license. Team names must include at least one agent's last name or family name with the term "associates," group" or "team." Compliance with fictitious business name requirements is required. Advertising that contains the team name must include: licensee's name, license number, responsible

broker's identity, and no implication of an entity separate from the responsible broker. There are details about font size. Bus. & Prof. Code §§10159.6, 10159.7. Effective 1/1/15.

Agency Disclosure Required for Commercial Transactions. Agency disclosure form must now be used for commercial transactions. "Commercial real property" means all real property in the state, except single-family residential real property. Agency disclosure forms are required for all leases with a term longer than one year. Civ. Code §2079.13. Effective 1/1/15.

Energy Use Disclosures for Commercial Property. Commencing July 1, 2013, owners and operators of certain commercial buildings are required to disclose to tenants and prospective tenants energy, in advance of sale, lease finance or refinance, consumption information relating to the building. Specifically, any commercial building with total gross floor area measuring in excess of 50,000 square feet must disclose energy benchmarking data to buyers or tenants leasing the entire building. Commencing on January 1, 2014, this requirement is expanded to include buildings with a total gross floor area measuring in excess of 10,000 square feet, and commencing on July 1, 2016, this requirement is further expanded to include buildings with a total gross floor area measuring at least 5,000 square feet. Pub. Resources Code sec. 25402.10; http://www.energy.ca.gov/ab1103. On September 2, 2014, the Office of Administrative Law (OAL) approved the California Energy Commission's proposal to delay implementation of the Nonresidential Building Energy Use Disclosure Program for buildings from 5,000 to 10,000 square feet until July 1, 2016.

HELOC Suspension During Escrow. Seller/borrower may suspend the HELOC during escrow to avoid drawing on it and inadvertently becoming a debt of the innocent buyer. Lender must comply with demand for suspension. Civ. Code §2943.1. Effectively July 1, 2015.

Backyard Gardening. Landlords, including HOA's must permit tenants to participate in "personal agriculture" in tenant's backyard area to grow edible fruits and vegetables, marijuana not permitted. Civ. Code §§1940.10, 4750.

HOA Maintenance Obligations. Effective January 1, 2017, a common interest development is responsible for repairing and replacing exclusive common areas. The owner is only responsible for maintenance. Civ. Code § 4775.

Electric Charging Stations. Landlords must permit installation of electric charging stations by tenants that meet statutory and local land use requirements. Law does not apply to residential properties with four or less parking spaces, and commercial spaces with less than 50 parking spaces. Tenant must maintain a one million dollar liability policy. Tenant is responsible for all installation and removal costs. Civ. Code §§ 1947.6, 1952.7. Effective July 1, 2015.

Security Deposits. Landlords and tenants may use electronic communications regarding security deposits, but not for the itemization by landlord within 21 days after a tenant vacates, which still must by personal delivery or first class mail. Civ. Code §§ 1633.3 Effective 1/1/15.

Documentary Transfer Tax. New law repeals ability to keep purchase price confidential. Every document subject to the DTT, when recorded, must show on its face the amount of tax due. Rev. & Tax. Code §§11932, 11933.

V. 2014 Cases of Note.

***King v. Wu* (2013) 218 Cal.App.4th 1211. Five year requirement for prescriptive easement excepted.** In 1963, **o**wner purchased a SFR. In 1965, owner began renting the property until 2008. In

2009, owner began building a metal guardrail to reclaim a strip of owner's property 8 inches wide and 90 feet long used by the adjoining neighbor for driveway purposes, which had been constructed in 1960. Neighbor sued and claimed a prescriptive easement (1): claimant has used the property for at least five years, which use has been open and notorious, continuous, hostile to the true owner, and under claim of right. Owner won at trial because owner had not been in possession for approx. 49 years. The court of appeal reversed, holding that owner regained possession briefly during turnover in tenancies, and therefore the use was "hostile" to the true owner. **This is a bad decision and will lead numerous lawsuits against owners of rental property. Conflicting California law does not permit such prescriptive easements to be obtained against rental property.** *Dieterich Int'l Truck Sales, Inc. v. J.S. & J Services, Inc.* (2002) 3 Cal.App.3d 1601.

Rye v. Tahoe Truckee Sierra Disposal Company, Inc. (2014) 222 Cal.App.4th 84. **Historic use of easement determines the extent of the easement**. Disposal Company pursuant a recorded easement had the right to park trucks and storage of disposal bins. The remaining portion of the property was used by owner for a wood supply business. In 2004, owner closed his business, and Disposal Company claimed the right to use the entire parcel for its trucks and bins. The easement did not specify an exact area of the parcel burdened by the easement. The court held in this circumstance the extent of the easement can be determined by historic uses of the property. Further, Disposal Company's claim to use the entire property would amount to a disfavored exclusive easement. **This decision points out the necessity of documenting not only the use but the easement area as well.**

***Benson v. Marin County Assessment Appeal Board* (2014) 219 Cal.App.4th 1445. Termination of a joint tenancy triggers property tax reassessment.** Mother owned a home in Mill Valley and had two sons, Peter and James. Mother created a joint tenancy title to the home with Peter. In 1997, mother passed away and Peter became the sole owner of the property. Peter then created a joint tenancy with brother, James. In 2007, James severed the joint tenancy, creating a tenancy in common. The Marin County Assessor's office treated the termination of the joint tenancy as a change in ownership subject to reassessment: $101,631 to $525,323, increasing annual property taxes by $2,682.84. James challenged the assessment, and was rejected the Assessor. On appeal to the Assessment Appeal Board, the decision was reversed. The Assessor then filed a writ to the Marin County Superior Court, who denied the Assessor's challenge, but the Assessor was not done, and appealed to the Court of Appeal, who reversed and held while the creation of a joint tenancy is not a change in ownership, the termination of a family joint tenancy triggers reassessment. **This case means property owners should never use joint tenancy as an estate planning tool.**

***Ash v. North American Title Company* (2014) 223 Cal.App.4th 1258. Tax liability for failed 1031 exchange held to be unrecoverable as general damages but may be recoverable as special damages.** Seller and buyer entered into an agreement for the purchase of property and buyer requested and seller agreed to cooperate in a 1031 tax deferred exchange. The exchange intermediary filed bankruptcy, preventing escrow from timely closing and ultimately, causing the tax deferred exchange to fail because of delay in releasing funds from the bankruptcy court. Buyer sued seller and the escrow company. Trial court actually awarded $300,000 in general damages against seller on a breach of contract theory to the buyer, and $1M in damages against escrow on special damages arising from the bankruptcy court's delay in releasing funds. On appeal the court directed a retrial of the damages and said the $465,000 resulting tax liability was not recoverable because it was not foreseeable. **This case is important because 1031 exchanges are common and sellers must be wary of liability to buyers for failed exchanges. In every RPA, RLG recommends that an addendum provide the seller shall have no liability for special damages in a 1031 exchange.**

***Richman v. Hartley* (2014) 224 Cal.App.4th 1182. RETDS required if there is any residential component in the sale.** Seller owned a property with two structures—a commercial building and a

residential duplex. Buyer breached and seller sued (not clear if there was a liquidated damages provision in effect). Buyer defended because seller failed to provide a RETDS. The court held the TDS applies to any transfer of real property containing 1 to 4 units, as well as to leases over a year. Even if the seller is statutorily exempt to provide a RETDS, agents still are obligated on 1 to 4 unit residential property to provide an AVID, and the listing agent must actually communicate with the seller about the listing agent's observations.

Saffie v. Schmeling **(2014) 224 Cal.App.4th 563. Listing broker not liable when buyer and selling broker misconstrue accurate statements in the MLS. In 2006,** listing broker posted on MLS the sale of a 0.62 acre vacant parcel. Listing agent stated, "This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist." During escrow, listing broker gave selling broker a copy of the geologist report, dated May 20, 1982. Buyer conducted no further due diligence on the soils issue. After close of escrow buyer tried to develop the property and the county advised the report was dated, not sufficient, and additional investigation was necessary. Buyer sued everyone, including seller and both agents. At trial, the court found no liability to seller and listing broker, but did find liability to the selling broker and awarded $232,147.50. On appeal the decision was affirmed, holding selling broker had a duty to determine whether the report should be relied upon for buyer's development plans and failed to point out the old 1982 date on the report. Civil code section 1088 provides that a listing broker is responsible for the truth of all statements of facts which the listing broker had knowledge or reasonably should have knowledge and are posted on MLS. Listing broker's duty to buyer to is one of honestly, fairness and full disclosure. Listings broker's description of the report were factually true. **Here, listing broker dodged a bullet when stating the property is buildable. This case imposes a fiduciary duty on selling agents to investigate the significance of reports.**

Horiike v. Coldwell Banker **(2014) 225 Cal.App.4th 427. Dual agency creates fiduciary duties for both listing and selling agents.** Listing agent a property in Malibu for sale. MLS provided the listing agent with public record information showing the living area as 9,434 sf. The owner's building permit indicated 11,050 sf. Listing agent stated on MLS the property has approx. 15,000 sf, and was touted on marketing fliers. Buyer No. 1 asked for confirmation of the square footage, and listing agent produced an architect's letter stating approx. 15,000 sf. Listing agent said no architectural plans were available and recommended the buyer verify square footage. Buyer No. 1 canceled escrow. Then Buyer No. 2 made an offer represented by another CB agent, creating dual agency. Listing agent gave buyer's agent his flier touting 15,000 sf, and owner's building permit stating 11,050. Escrow closed with Buyer No. 2 purchasing the property. In 2009, buyer sought out listing agent in connection with work on the property to confirm 15,000 sf, and listing agent could not verify the source of the information. At trial, plaintiff's expert stated there was 11,964, and defendant's expert 14,186. At trial, listing agent was found to have no liability. On appeal this decision was reversed and remanded for retrial. In this dual agency transaction, both agents working for the same broker have the same fiduciary duty to both seller and buyer. **The agent in this transaction as described in the Confirmation of Agency form is the brokerage firm, not the individual sales persons. In dual agency, each individual licensee has a fiduciary duty to both the seller and the buyer because the licensees fulfill the brokerage's duties.**

Peake v. Underwood **(2014) 227 Cal.App.4th 428. Listing agent awarded sanctions for defense of meritless lawsuit.** After close of escrow, buyer filed suit against seller and listing agent alleging failure to disclose defective subflooring. During discovery, buyer admitted listing agent provided buyer with photographs and reports disclosing the defective subflooring. Buyer refused to dismiss the case, and agent filed a motion pursuant to Code of Civil Procedure section 128.7 seeking sanctions and dismissal of the case, contending buyer's claim was frivolous. The trial court ordered the case dismissed and sanctioned buyer $60,000 representative of buyer's attorney's fees. The decision was

affirmed on appeal, holding the admitted facts unequivocally established buyer was aware of the subflooring defects before escrow closed. Note, Section 128.7 motions are rarely granted.

Schmidt v. Bank of America **(2014) 223 Cal.App.4th 1489. Private road easements may not allow subsurface improvements.** In 1941, owner of two parcels sold one parcel and reserved that stated, "The right of ingress and egress for public road purposes over, along and across the easterly 40 feet." This easement was necessary access the public right of way. In 2008, a condo project was being built on the dominant tenant, e.g. the property benefited by the easement. The easement was improved with resurfacing and several subsurface improvements including: storm drains, sewer laterals, and steel rods for soil stability, and even named as a street. In 2009, the servient tenement owner, e.g. the property burdened by the easement, sued claiming such subsurface improvements were not authorized and damaged the servient tenement. On appeal, the court held the easement language was only for ingress and egress and did not create a public road. **A private road to reach a public road is not itself a public road. Before building on an easement over your neighbor's property, consult first.**

Johnson v. Prasad **(2014) 224 Cal.App. 4th 74. Swimming pools.** As a matter of law, landlords who knowingly rent out property with a maintained swimming pool owe a duty of care to protect **the** tenant**'s** guests from drowning. Here, a four year old drowned and was on a ventilator for 19 days.

People v. Denman **(2013) 218 Cal.App. 4th 800. Recordation absent title or interest in underlying property is a felony.** Recording a quitclaim deed transfer with knowledge that the transferor has *no* title or interest in the subject property constitutes a felony under Pen. Code § 115.

Rutherford Holdings, LLC v. Plaza Del Rey **(2014) 223 Cal.App 4th 221**. **Deposit kept seller.** In the absence of escrow instructions to the contrary, title to a deposit vests in the seller when the seller accepts the underlying contract. Thus, a deposit tendered directly to a mobile home park vendor rather than placed in escrow resulted in a transfer of title to the vendor after the sale did not close.

VI. Rifkind Law Group Recent Pending Cases/Transactions

A. Litigation

1. Non-disclosure, defense of sellers. San Rafael, San Anselmo
2. Trial of partnership dispute where the partners disputed the nature of their relations, e.g. partners or lender/borrower over the investment and sale of real property-Tiburon.
3. Co-ownership/partition action-San Anselmo.
4. Non-disclosure case-San Anselmo.
5. Easement disputes-Greenbrae, Muir Beach, Novato, Ross (on appeal), San Anselmo (2), Tiburon
6. Title priority dispute in context of foreclosure
7. Evictions.
8. Tree disputes.
9. Drainage dispute. (CM)
10. Business disputes

B. Land Use

1. Marin General Hospital Replacement Project-Marin County
2. Bon Air Bridge Replacement Project-Larkspur

3. Access4Bikes, Marin County Open Space Road and Trail Management Plan
4. Subdivision approval-Larkspur
5. Opposition to remodel-Kentfield (2), Sausalito
6. Approval of new remodel-Tiburon
7. Building code disputes-Ross
8. Fire access requirements-Ross
9. Overburden private easement by major recreational facility-San Rafael

C. Transactions

1. Purchase and sale agreements. (Incl. from local agencies)
2. FSBO's.
3. Easements.
4. Entity formation—LLC's
5. Commercial leasing—Swift Real Estate ($1B REIT), Office, Retail
6. Construction contracts.
7. Architectural agreements.

D. Estate Planning

1. Trusts
2. Trust administration

E. General Counsel—Meridian Sports Clubs, David Barton Gym (CA, FL, HI, IL, NV, NY, WA)