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ARTICLE**PROPERTY OWNERS' ALERT: NEWLY EFFECTIVE
STATUTORY REQUIREMENTS FOR INSTALLATION
OF WATER-CONSERVING PLUMBING FIXTURES**

By Xavier L. Gutierrez*

The real estate industry and the media recently have been focused on the updates to the Title 24 energy regulations (24 California Code of Regulations, Part 5) that became effective on July 1, 2014, and the increased costs in the completion of tenant improvements that may result from these standards. In the meantime, however, the delayed compliance deadlines for a lesser-known (or perhaps a lesser-publicized) requirement in California to install water-conserving plumbing fixtures have now arrived, and will also likely result in increased costs in the completion of tenant improvements as well as other obligations for all property owners, including single family homeowners. These requirements were enacted several years before the current drought conditions now impacting the state, but the heightened importance of water conservation will draw greater attention from regulators and building officials in light of present water shortages, and pose particular issues for owners and tenants of real property of all types.

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1. BACKGROUND

New-construction standards are now applicable to buildings built prior to 1994. California law has required that all toilets and urinals sold or installed on or after January 1, 1994 be low-flow (i.e., toilets having a maximum of 1.6 gallons per flush, and urinals having a maximum of 1 gallon per flush).¹ Subsequent legislation enacted in 2009² was intended to update pre-1994 buildings (and the toilets, urinals, showerheads, faucets and other plumbing fixtures therein), by requiring that the same water-conserving plumbing fixtures be installed in residential and commercial real property built and available for use on or before January 1, 1994. Because the effective date for complying with such requirements was postponed for several years, many may have overlooked these requirements. The law took effect on January 1, 2014, so the time has come to confirm compliance with its requirements.

Water-conserving plumbing fixtures, defined. Water-conserving plumbing fixtures are those that are in compliance with current building standards applicable to newly constructed real property of the same type.³ Expressly included in the definition of a “noncompliant plumbing fixture” are: (1) any toilet manufactured to use more than 1.6 gallons of water per flush; (2) any urinal manufactured to use more than one gallon of water per flush; (3) any showerhead manufactured to have a flow capacity of more than 2.5 gallons of water per minute; and (4) any interior faucet that emits more than 2.2 gallons of water per minute.⁴

2. CURRENT COMPLIANCE DEADLINES TRIGGERED BY BUILDING PERMIT ISSUANCE AFTER JANUARY 1, 2014

Some replacement fixtures are required now (on and after January 1, 2014) of all building permit applicants. Beginning January 1, 2014, the building permit applicant must replace all non-compliant plumbing fixtures with water-conserving plumbing fixtures, although the scope of the replacement requirement depends on the type of property and the nature of the work covered by the permit.

Commercial and multifamily properties. For multifamily residential real property and any commercial real property, such replacement is a condition for the issuance of a certificate of final completion and occupancy or final permit approval if any one of the following occur.⁵

(1) There is a building addition in which the sum of concurrent building permits by the same permit applicant would increase the

floor area of the space in a building by more than 10 percent (in which case all non-compliant plumbing fixtures in the building need to be replaced); or

(2) There is a building alteration or improvement in which the total construction cost estimated in the building permit is greater than \$150,000 (in which case, only the non-compliant plumbing fixtures that service the specific area of the improvements need to be replaced);⁶ or

(3) There is an alteration or improvement to a room in a building that requires a building permit and that room contains any non-compliant plumbing fixtures (in which case, only the non-compliant plumbing fixtures in that room need to be replaced).

Single-family residential properties. For single-family residential real property, such replacement is a condition for the issuance of a certificate of final completion and occupancy or final permit approval if there is any building alteration or improvement (in which case all non-compliant plumbing fixtures in the building need to be replaced).⁷

3. COMPLETE RETROFIT REQUIREMENTS EFFECTIVE IN 2017 AND 2019

The law requires a complete retrofit of all non-compliant fixtures, without regard to whether a building permit is being issued, as follows:

Required on and after January 1, 2017 of all single-family owners. Owners of single-family residential real property are required to replace all non-compliant plumbing fixtures therein with water-conserving plumbing fixtures by January 1, 2017.⁸

Required on and after January 1, 2019 of all other owners. For multifamily residential real property and any commercial real property, all non-compliant plumbing fixtures must be replaced with water-conserving plumbing fixtures by January 1, 2019. The statute does not specifically impose this obligation on the “owner” of multifamily or commercial property; however, a tenant is responsible to notify the landlord of any non-compliant fixtures in his or her “unit,” and the landlord has a right to enter the unit to replace the fixtures.⁹

4. DISCLOSURE REQUIREMENTS

Duty to disclose on sale or transfer. The law includes an implicit enforcement mechanism by requiring the “seller or transferor” of the affected real property to disclose in writing to the transferee whether it is in compliance with the new statutes.

Required on and after January 1, 2017 of single-family owners. The seller or transferor of single-family residential real property is required to disclose in writing to the prospective purchaser or transferee the foregoing requirements and whether the real property includes any non-compliant plumbing fixtures.¹⁰

Required on and after January 1, 2019 of all others. The seller or transferor of multifamily residential real property and any commercial real property is required to disclose in writing to the prospective purchaser or transferee the foregoing requirements and whether the real property includes any non-compliant plumbing fixtures.¹¹

Transferor and transferee might include lease transactions. The language of the statute requiring disclosure is expressed in terms of “seller or transferor” and “buyer or transferee.” In this context, “transferor” and “transferee” might be considered to include a landlord or a tenant, respectively.¹² The statute does not define “transferor” or “transferee” although it provides that a “sale or transfer” does not include a sale or transfer of a partial interest, including a leasehold,¹³ which leaves the application of the disclosure requirements to leasing transactions uncertain. More likely, there is no disclosure obligation because the lease is not a “sale or transfer,” but the statute is not clear in this regard.

5. NOT APPLICABLE TO CERTAIN BUILDINGS

Postponed with respect to buildings for which a demolition permit is issued.¹⁴ Compliance with the foregoing requirements may be postponed for one year from the date of issuance of a demolition permit for a building. If the building is demolished within the one-year postponement, none of these requirements apply. However, obviously, the water-conserving plumbing fixtures will be required to be installed in the new building pursuant to current building standards and laws applicable to new buildings. If the building is not demolished within the one-year postponement, the foregoing requirements will would apply to the existing building, subject to appeal to the local building department.

Certain exempt buildings. The following buildings are not required to comply with the foregoing water-conserving plumbing fixture requirements: (i) registered historical sites; (ii) real property for which a licensed plumber certifies that, due to the age or configuration of the property or its plumbing, installation of water-conserving plumbing fix-

tures is not technically feasible; and (iii) a building for which water service is permanently disconnected.¹⁵

6. IMPORTANCE OF THE FUTURE RETROFIT STANDARDS IN CURRENT TRANSACTIONS

Landlord/Tenant and Leases

As of now, the law requires that the “building permit applicant” is responsible for replacing all non-compliant plumbing fixtures with water-conserving plumbing fixtures if the building and circumstances require such replacement.¹⁶ Accordingly, landlords and tenants alike that own or occupy a building with non-compliant fixtures built prior to 1994 should consider the risks of such replacements being required in connection with any contemplated improvements and the added cost of such replacements. The parties will need to consider which party will perform the improvements under the lease (and who will be the building permit applicant) and be clear as to who is responsible for replacing non-compliant plumbing fixtures.

A lease may allocate responsibilities between the landlord and the tenant based on the location of the required improvement (for example, the tenant may be responsible for its premises and the landlord may be responsible for the common areas); however, it is not unusual for leases to shift responsibilities in certain circumstances. For example, the landlord may want to shift the responsibility for certain common area alterations if the tenant’s specific use or improvements require the alterations to the common area. This is a particular concern if, as noted above, a building inspector takes a broad reading of the law and tries to require, as a condition for the issuance of a certificate of final completion and occupancy or final permit approval for a tenant’s space, that common area restrooms be upgraded with water-compliant plumbing fixtures if they service the tenant space that is being improved.

Consideration

As noted above, effective January 1, 2019, the law will require the owners of multifamily residential real property and any commercial real property to comply with the requirements and provide the required disclosures (January 1, 2017 for single-family residential real property). Although disclosures to tenants are not expressly mentioned, disclosures to transferees are required, and in this context a “transferee” could potentially be construed as including the tenant. Accordingly, commencing January 1,

2017 as to the leasing of single-family residential real property, and commencing January 1, 2019 as to the leasing of multifamily residential real estate and any commercial real property, if not sooner, landlords should consider whether to revise their form leases to include the required disclosures (as summarized in paragraph 4 above). It is unclear how these provisions will be applied as between the parties to existing leases that do not specifically refer to these compliance requirements.

In addition, as noted above, it appears the owner (and not a tenant) is required to perform such replacements. Although the law does not address whether an owner may shift such responsibilities to a tenant, landlords should consider whether to expressly shift this burden to tenants or whether the generic provision requiring the tenant to maintain the premises is sufficient. Even if the owner is responsible for making improvements, the parties should consider whether the landlord can pass through the costs under the lease as common area maintenance, and the possible delay in the tenant obtaining its certificate of occupancy due to the need to complete such required replacements. These issues should be considered for leases being negotiated and executed now (with terms extending beyond January 1, 2019 as to leases involving multifamily residential real property and any commercial real property, or beyond January 1, 2017 as to single-family residential real property) since the requirements will be triggered during the lease terms.

Buyers/Purchase Agreements

Commencing January 1, 2017 or January 1, 2019, depending on the type of property, purchase agreement forms should be revised to include the disclosures set forth in paragraph 4 above. In addition, buyers of real property may want to consider the required water-conserving plumbing fixtures in evaluating the purchase price of property today. For example, an apartment complex with the required water-conserving plumbing fixtures should be valued higher than an apartment complex without such fixtures since the buyer will need to upgrade such fixtures by January 1, 2019. Likewise, a developer contemplating a building addition or other improvements to a property should consider these additional requirements and costs associated therewith, especially if the developer is looking to acquire the property for which a building addition or other improvements are contemplated.

7. CONCLUSION

Although other compliance requirements have received more publicity of late, the real estate industry should not overlook the less-publicized requirement to install water-conserving plumbing fixtures and the resulting increased costs that are now in effect, as well as additional requirements that will go into effect in 2017 and 2019 for single-family, and multifamily and commercial properties, respectively.

NOTES

1. 1992 Stats. Ch. 1347 (SB 1224). Note, however, that Health & Safety Code §17921.3 mandates that only “high efficiency” toilets and urinals (i.e., toilets having a maximum of 1.28 gallons per flush, and urinals having a maximum of 0.5 gallon per flush) be sold or installed as of January 1, 2014, so, effectively, the “high efficiency” toilets and urinals will be installed as part of the required water-conserving plumbing fixture updates to pre-1994 buildings.
2. 2009 Stats., Ch. 587 (SB 407) §1.
3. Civ. Code, §1101.3.
4. Civ. Code, §1101.3, subd. (c).
5. Civ. Code, §1101.5, subd. (d).
6. Note: This subparagraph (B) of Civ. Code, §1101.5, subd. (d) appears to address not only the fixtures located within a restroom that is remodeled, but also, when read together with subparagraph (C), to require fixtures to be replaced in restrooms located within the tenant’s premises that are being improved (even if the restroom itself is not being improved). Query whether this subparagraph (B) can be used even more broadly to require fixtures to be replaced in common area restrooms that are located outside of the tenant’s premises that are being improved. Since the statute refers to those fixtures that service the specific area (and not necessarily those within the specific area), a building inspector may try to expand the area for which new fixtures are required and may hold up the issuance of a certificate of final completion and occupancy or final permit approval on account thereof.
7. Civ. Code, §1101.4, subd. (a).
8. Civ. Code, §1101.4(6).
9. Civ. Code, §1101.5, subd. (a). Although Civ. Code, §1101.5 subparagraph (a) does not specify that the owner is required to perform such replacements (versus Civ. Code, §1101.4, subd. (c), which expressly requires the owner of a single-family residential real property to perform such replacements), Civ. Code, §1101.5, subd. (b), permits an owner or an owner’s agent to enter the property for purposes of installing, repairing, testing, and maintaining the required water-conserving plumbing fixtures (referring to the notice requirements of Civ. Code 1954 entitled “Entry by Landlord”), and Civ. Code, §1101.5, subd. (c) provides that the owner or owner’s agent shall correct an inoperability in a water-conserving plumbing fixture upon notice by the tenant or if detected by the owner or the owner’s agent, thereby suggesting that the owner, and not a tenant, is required to install, repair, test, and maintain the required water-conserving plumbing fixtures within such tenant space.
10. Civ. Code, §1101.4, subd. (c).
11. Civ. Code, §1101.5, subd. (e).
12. Civ. Code, §§1101.4, subd. (c), 1101.5, subd. (e).

- 13. Civ. Code, §1101.3.
- 14. Civ. Code, §1101.6.
- 15. Civ. Code, §1101.7.
- 16. Civ. Code, §§1101.4, 1101.5.

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