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Redevelopment

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California Redevelopment Association

Brownfields Issue

The Newest Tool in the Brownfields Toolbox

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California's real estate market for urban Brownfields properties (i.e., those that are vacant or severely underutilized because of actual or perceived environmental contamination) presents quite an anomaly for redevelopment agencies. While estimates for such Brownfields sites range as high as 100,000 properties statewide, and despite the existence of what may still be termed as a "white-hot" market in California for urban infill property, many of these Brownfields properties are still not moving to the *development deal* stage. Redevelopment agencies are constantly looking for new ways to create incentives for the redevelopment of Brownfields properties, and California Senate Bill 989 (SB 989) can be an important new tool.

The "Chicken and Egg" Problem

Several factors are to blame for the inefficiency in California's Brownfields market. There is always the concern that by acquiring title to a contaminated property a new property owner may be signing on for unknown millions in cleanup costs. This concern has been exacerbated in California since most of our groundwater has been declared to be a "potential source of drinking water."

Until remediation costs are known at a contaminated property, there is often no one to redevelop (or lend on the development of) a Brownfields site. Without this remediation cost information, property owners, potential developers, lenders, and local government are often unwilling to "front" site assessment and cleanup costs.

The SB 989 Solution

As the newest addition to California legislation in the Brownfields area, SB 989 was created specifically to deal with this inefficiency in the real estate marketplace. SB 989 is perhaps the first Brownfields tool specially designed to address the absence of available environmental data at many of these sites.

SB 989 allows site remediation efforts to be bifurcated between surface soil (and soil vapor) issues, and the potentially costly deep soil and groundwater issues. Under this bifurcation approach, a developer using the SB 989 statutory scheme need make only the site safe for the intended redevelopment. The exact standard in the statute is "no unreasonable risk to human health or safety of intended site occupants."

The goal of SB 989 is to encourage investment in contaminated properties by providing a mechanism to limit liability risks associated with those cases where cleanup costs turn out to be substantially higher than the value of the property in an uncontaminated condition. This SB 989 relief is available only where a developer occupies a property as a long-term ground tenant (e.g., a 99-year ground lease), and has no impact on the existing statutory liability scheme that applies to present, prior or future owners of the property. SB 989 encourages private investment to pay for investigation and cleanup costs and to redevelop Brownfields sites.

The Typical SB 989 Scenario

The SB 989 model will often work as follows: A developer will first acquire development rights under a long-term ground lease, while the full extent of contamination is still being determined. The developer's liability will be limited during that phase to only on-site human health and safety issues related to the intended development. If cleanup costs turn out to be moderate and can be readily absorbed into the development deal, the developer will usually exercise a retained option to purchase, and will become a full-fledged fee title owner of the property.

However, if offsite contamination is so significant that the development won't "pencil out" if the developer is required to pay for offsite remediation, then the developer will likely remain as a long-term ground tenant (instead of a fee title owner of the property). The existing property owner would then conduct a full site cleanup using the lease payments and any other revenue the property owner generates from developing the property. The developer would pay the up-front capital costs since the developer is now able to include a worst case amount on its liability. The development would go forward on a long-term ground lease basis even if the deep soil and groundwater issues preclude the developer from becoming an actual fee title owner of the property.

The Regulatory Process for Using SB 989

The cleanup process and scope of immunity for *Bona Fide Ground Tenants* under SB 989 are based on the provisions of AB 389, the California Land Reuse and Revitalization Act of 2004, which provides liability protections and streamlines the cleanup process. A developer wishing to limit its liability as a Bona Fide Ground Tenant must enter into an agreement with the Department of Toxic Substances Control ("DTSC") or a regional water quality control board, whereby that Bona Fide Ground Tenant agrees to be responsible to make the property safe for the intended development. This written agreement must also be signed by the property owner (or a redevelopment agency, city or county), who must commit to do the rest of the remediation. With such an agreement in place, the Bona Fide Ground Tenant gets immunity once the site is placed in a position where there is no unreasonable risk to the human health or safety of intended site occupants.

There are several provisions in SB 989, which are designed to ensure that the redevelopment plans of the developer ground tenant are consistent with local plans for the area. Health risk assessments are also required, where appropriate. The bill additionally provides for public participation consistent with the AB 389 cleanup process.

SB 989 Can Help Redevelopment

Many of California's redevelopment agencies face blighted, contaminated, and underutilized infill properties. If used properly, SB 989 can be an important tool to help *jumpstart* redevelopment in many of these Brownfields sites.