The Arnold Law Practice

News From the Practice

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Cal ReUSE Loans for Brownfield Redevelopment

Legislation enacted in 2000 created the Cal ReUSE program, offering low-interest forgivable loans of up to $125,000 to assist in the redevelopment of Brownfield properties.

Eligible Projects: Sites that have economically beneficial redevelopment potential; sites that are not currently redeveloped due to uncertainty regarding contamination; projects that will result in the cleanup of contamination.

Eligible Costs: loans can be used for environmental investigation, site assessment and characterization, technical assistance, and remediation planning.

Loan Terms: 2.66% interest rate (based on the State's Surplus Money Investment Fund earnings); no interest payments required during the term of the loan; loan may be forgiven if the borrower, acting reasonably and in good faith, fails to complete the project or proceed with development

If you think you might be eligible, call the Arnold Law Practice for further advice.

Quote of the Month

Whales only get harpooned
when they come to the surface.

Turtles can only move forward
when they stick their neck out.

But property owners face environmental
risk no matter what they do.

*To paraphrase Charles A. Jaffe,
senior columnist at Marketwatch.*

"Taking" by Raw Sewage

Palo Alto recently paid for a "taking" when a broken sewer line twice flooded a home with raw sewage. *California State Automobile Association v. City of Palo* Alto (Apr. 10, 2006). Palo Alto (like many other cities in California) has sewer mains made of clay pipe. The sewer mains allow tree roots to intrude which cause back ups. In this case, the blocking of the sewer main caused sewage to back up into a home. After paying to repair the damages, the insurance company for the property owners sued Palo Alto for the property damage as a "taking."

The California Constitution says the government cannot *take or damage* private property for public use without just compensation. Cal. Const. Art. 1, Sec. 19. (The 5th Amendment to the U.S. Constitution only prohibits a "taking" without compensation.) California courts have found cities liable for a "taking or damaging" when public improvements fail to work as they are intended and cause damage to private property.

In this case, the court required the plaintiff to prove that Palo Alto's broken sewer main *caused* the property damage. The test applied by the court was whether a public improvement was a "substantial factor" in causing the injury (*i.e.,* there was little probability that other forces alone caused the injury).

The plaintiff proved that the home's lateral sewer line did not cause the flooding, and that the only possible cause was the blocked main sewer line owned and maintained by the city. The plaintiff was helped by the fact that the home's lateral line was new and non-porous. When the house flooded, the new lateral sewer line was found to be in perfect condition. But an inspection of the city's main sewer line revealed flaws including, tree root blockages, an inadequate slope, and standing water. The court awarded damages because the plaintiff did everything possible to fix the home's sewer line — and had no control over the flaws in the city's building or maintaining the sewer main.

Jessica Grannis of the Arnold Law Practice said "this case may cause cities, already strapped by budget deficits, to take on expensive repairs of public improvements to avoid liability."

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The Arnold Law Practice represents business owners in multi-defendant litigation with claims of groundwater pollution by drycleaning practices, USTs, waste disposal practices, OSHA penalty issues, claims against environmental consultants as to site audits, Fish & Game civil penalty proceedings, condemnation of portions of business for road expansion, failure of seller to disclose buried contamination, compliance with air pollution control laws, civil penalties from air quality management districts, spill response claims, toxics reporting and disclosure requirements, UST closure laws.

The Arnold Law Practice represents individuals in state and federal courts in a variety of lawsuits, including complaints for specific performance of real estate contracts, quiet title, defending permits issued by the National Marine Fisheries Service, defending and prosecuting construction claims, breach of contract, negligence, fraud, property trespass and damages, and related matters.

The Arnold Law Practice associates with specialized counsel in complex real estate closings, estate and trust planning, partition actions involving contamination, and transfers of real estate with indemnities and cleanup rights under the California UST Fund.

Prop. 65 – Generic Warnings and Settlements Can Be a Trap

WARNING

This area contains chemicals known to cause cancer, and birth defects and other reproductive harm.

A California appeals court tells us why generic warnings can trap the unwary. *Consumer Defense Grp. v. Rental Housing Industry Members*, 137 Cal.App.4th 1135 (March 24, 2006).

Proposition 65 (“Prop.65”) requires warnings before exposures to a variety of substances. Defendant businesses and property owners must post a warning if they cannot prove exposures are “safe.” Fines up to $2,500 per exposure can become enormous. Proving substances are “safe” and possible fines, lead businesses to post “generic Prop.65 notices” (like the one pictured here). But, generic notices may not work!

In this case, a law firm sent a 22 page “laundry list” to owners (and managers) of 1,000+ apartments, claiming exposures without warnings for such things as automobile emissions, second hand tobacco smoke, roofing materials, furniture with foam stuffing, and paint. Years before the law firm sued, and the owners (and their trade group) agreed to settle. The law firm would get $540,000 in attorneys fees. The owners, *et al.,* would post generic warnings (with a web site), and would be immunized from similar Prop.65 claims.

The lawsuit was pre-arranged and the parties got a “sign-off” from the trial court. The California Attorney General appealed. He claimed the public interest was not served with a generic Prop. 65 notice and a “shakedown” payment to the law firm. The appeals court dismissed the case and so nullified the settlement.

The court criticized both the law firm and the apartment owners. The lawyers were using Prop.65 to get excessive fees. The owners were going to pay to have the courts bar any future law suits. But, the public would not be warned about specific toxics exposures, and neither they nor the Attorney General could ever sue under Prop.65 in the future.

This case has three lessons: (1) The Attorney General can challenge generic Prop.65 warnings at any time, even after settlements. (2) Increasingly popular settlements with “bounty hunter” lawyers may not work. (3) Both pre-lawsuit notices and Prop. 65 warnings should give enough detail about specific exposures that individuals can determine if there is a genuine threat to themselves.

If you would like a copy of the Consumer Defense Group decision – or the same judge’s decision that aerospace parts are not made of “tofu and sprouts,” call the Arnold Law Practice.