The Arnold Law Practice

News From the Practice

Volume 6, Issue 8 August 2006

When Trees in Street Block Billboards, Owner Gets No $$

If you have flown to Los Angeles recently, you have seen the facts of *Regency Outdoor Advertising v. City of Los Angeles*. Six years ago, LA put palm trees and lighted pylons on the Century Boulevard approach to LAX. The trees and pylons obscure the view of 6 billboards. The owner of the billboards sued for a "taking or damaging" of private property without "just compensation" — a violation of the State Constitution.

Century Boulevard at LAX

The Court of Appeals ruled Aug. 7 that while roadside property owners have "an easement of a reasonable view of property," California cities do not have to pay until there is "substantial impairment." Changing a street by planting trees is not a "substantial impairment" and the City doesn't have to pay the owner of the billboards.

Road & Access Law

The presentations on *Road and Access Law* in July by The Arnold Law Practice were successful. The audiences at three locations in Sacramento, San Francisco, and San Jose included attorneys, ranch owners, surveyors, and county and city government staffers from throughout Northern California.

If you need help with property rights and easements, streets and roads, please contact *The Arnold Law Practice.*

San Jose Appeals Court Denies CGL Insurance Coverage for Successful Pollution Investigation

It is not often that a property owner can prove that it is not the source of groundwater contamination. If an owner proves it is not a polluter, shouldn't it be happy?

A recent decision says that proving you are not a polluter may not require your insurance company to reimburse you.

In *CDM Investors v. Travelers Insurance* (6th DCA, March 2006), the San Francisco Regional Water Quality Control Board ordered a commercial property owner to investigate contamination. The Board believed a tenant of the owner was the source of the contamination.

The property owner did three things. (a) It sued the tenant in federal court for CERCLA cleanup cost recovery; (b) It hired a consultant to investigate the contamination; and (c) It made claims against its CGL insurance carriers.

The result? The tenant counterclaimed under CERCLA in the lawsuit; the investigation cost $230,000 and showed that the source of the contamination was leaky sewers from another property; and the Court of Appeals refused to force CGL insurance carriers to pay the property owner.

There are three lessons from *CDM Investors.*

1. The California courts continue to rule that the "duty to defend" of insurance companies only includes lawsuits, and the "duty to indemnify" only includes money judgments ordered by courts.
2. The "absolute pollution exclusion" in CGL insurance policies can bar coverage for money spent to prove there is no pollution.
3. A counterclaim triggered by the policyholder's cleanup cost recovery lawsuit is not within the CGL "duty to defend" provision.

THE ARNOLD LAW PRACTICE

Three Decades of Environmental Law

225 Bush Street, 16th Floor
San Francisco, CA 94104

Phone: 415-439-8831
Fax: 925-284-1387
Email: JArnold102@aol.com

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, breach of contract, adverse possession, negligence, fraud, property trespass and damages, *etc.*

The Arnold Law Practice represents business owners who are food processors, petroleum fuel distributors, computer manufacturers, cell phone importers, banks, real estate developers, and others in wastewater discharge matters; questions as to UST compliance (and UST Fund reimbursements); Phase I and II Environmental Site Assessments; civil penalty proceedings with USEPA, Air Quality agencies, California Fish & Game, the State and Regional Water Quality Control Boards and local health departments; redevelopment issues with cleanups and "sign-offs;" condemnations of businesses and roads; questions of disclosure and reporting of buried contamination; compliance with Prop. 65 and how to interpret the California Rigid Plastic Packaging Law.

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.

Recent reports and information

More Info on Vapor Intrusion

In our last newsletter, we explained that vapor intrusion issues are important (a) because vapor intrusion is an "exposure pathway," and (b) local governments are getting District Attorneys involved.

One of our consultant friends, Glenn Leong of Treadwell & Rollo, notes that the EPA Region 9 preliminary remediation goals (PRGs) do not apply to vapors that are "volatile organic compounds" ("VOCs" such as TCE, DCA, PERC, and vinyl chloride). The PRGs are only for VOC exposures from ingestion ("eating dirt"), inhalation of dirt or vapors ("breathing dirt or fumes") or dermal absorption ("dirt on skin"). For such chemicals, data must be gathered for soil gases and evaluated for indoor vapor intrusion.

The lesson from all of this?

- Understand your goals. *Do you want to establish a level of safety or just satisfy some lender?*
- Use the correct "tools." *If you want to know about possible human exposures to soil gas, measure the soil gas and determine the levels of risk.*

Violations of Law ≠ Automatic Injunctions

A manufacturing plant in Ohio generated and stored liquid hazardous wastes twenty years ago. But, the plant violated the Resource Conservation and Recovery Act (RCRA) because it never had a "treatment, storage, and disposal facility" (TSDF) permit. The wastes were removed in 1987. A neighbor, using the "citizen suit" provisions of RCRA, sued the plant. The Ohio federal court ruled that the RCRA violations are "ongoing" because not having a TSDF permit and its records is a continuing violation of RCRA. But the Court refused to give the neighbor an injunction against the plant because *a violation of law does not automatically trigger an injunction.* *Hodgins v. Carlisle Engineered Products*, March 20, 2006.

Jim Arnold successfully argued the leading case in the 9th Circuit that even if violations of environmental law occur, courts should consider the facts of "injury" before issuing injunctions. See AMA v. Watt, 594 F.Supp. 923, 936-37, aff'd 714 F.2d 962.