
**OPPER
&
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THE ENVIRONMENTAL LAW
GROUP

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OVERVIEW

Three E's:

- **Examine Site Conditions**
- **Evaluate Risk**
- **Employ Tools to Reduce Risk**

EXAMINE SITE CONDITION

- All Appropriate Inquiry!
- Is there contamination?
- What's the source of the contamination?
- What's the cost to clean it up?
- What's the long term O&M cost?

EVALUATE RISK TO PURCHASE AND/OR DEVELOP

➤ Statutory Liability

- CERCLA, RCRA
- State Law (i.e. HSAA in Ca)

➤ Common Law Liability

- Nuisance, trespass, waste, negligence, strict liability

EXAMINE TOOLS TO REDUCE RISK

- The Buyer Entity
- Contractual Allocation of Risk
- Identification of Other Responsible Parties
- Federal and State Statutory Immunities
- Environmental Insurance
- Fixed Price Remediation Contracts
- Reimbursement Funding, Grants and Loans
- Creative Transactions
- Eminent Domain
- Design to Minimize Costs

STRUCTURE OF THE BUYER ENTITY

- Stand-alone entity
- No cross-liabilities; no indemnities

CONTRACTUAL ALLOCATION OF RISK

- Release of liability from buyer to seller
- Indemnity from buyer to seller
- Price reduction
- Escrow holdback of a portion of the purchase price
- Allocation of costs between parties

IDENTIFICATION OF OTHER RESPONSIBLE PARTIES

- Find someone else to pay for it
- Use statutory bases to force contribution
 - ERAP
 - Polanco
 - CERCLA

FEDERAL AND STATE STATUTORY IMMUNITIES

- The Small Business Liability Relief and Brownfields Revitalization Act of 2002 – bona fide prospective purchasers
- California Land Reuse and Revitalization Act of 2004 - bona fide purchaser/innocent landowner
- Polanco Redevelopment Act – immunity at completion of cleanup

ENVIRONMENTAL INSURANCE

- Pollution Legal Liability Insurance
- Cost Cap or Fixed Cost Remediation Insurance

POLLUTION LEGAL LIABILITY INSURANCE

- Site Specific
- Coverage:
 - Coverage for Unknowns (and for Knowns)
 - Cleanup Costs
 - Bodily Injury or Property Damage
 - Legal Defense
 - Regulatory Re-openers
 - Business Interruption
 - Non-Owned Disposal Locations

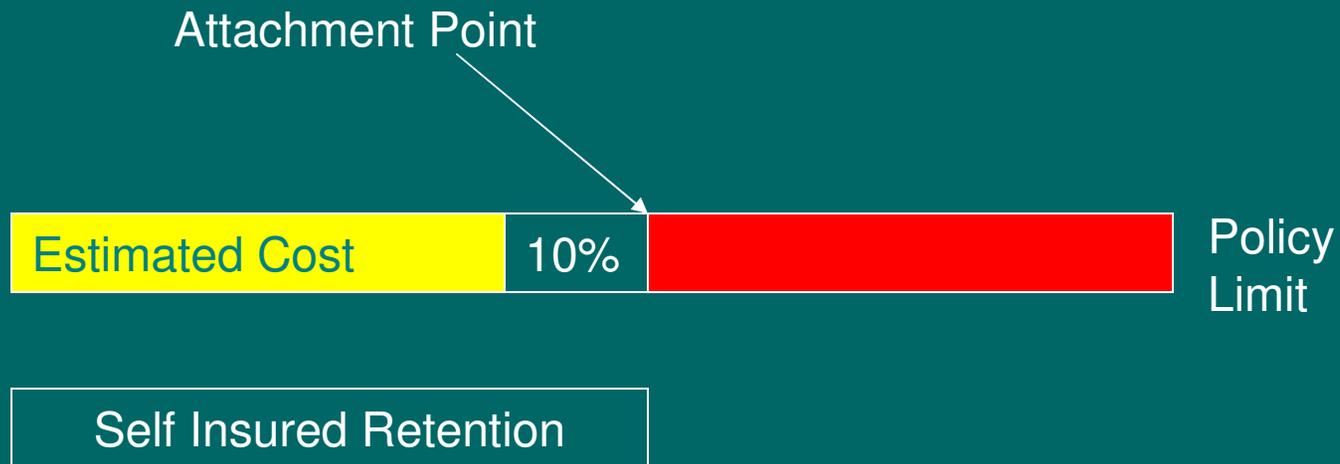
COST CAP OR FIXED COST REMEDIATION INSURANCE

First Party Remediation Stop Loss Policy

Project Specific Policy Which Insures Remedial
Projects For:

- Changed Conditions
- Newly Discovered Contamination During Cleanup
- Change in Regulatory Standards
- Change in Scope/Remediation Method
- Cost Increases

HOW FIXED COST REMEDIATION WORKS



FIXED PRICE REMEDIATION CONTRACTS

- Contract away the liability for environmental contamination
- Contract cost is high

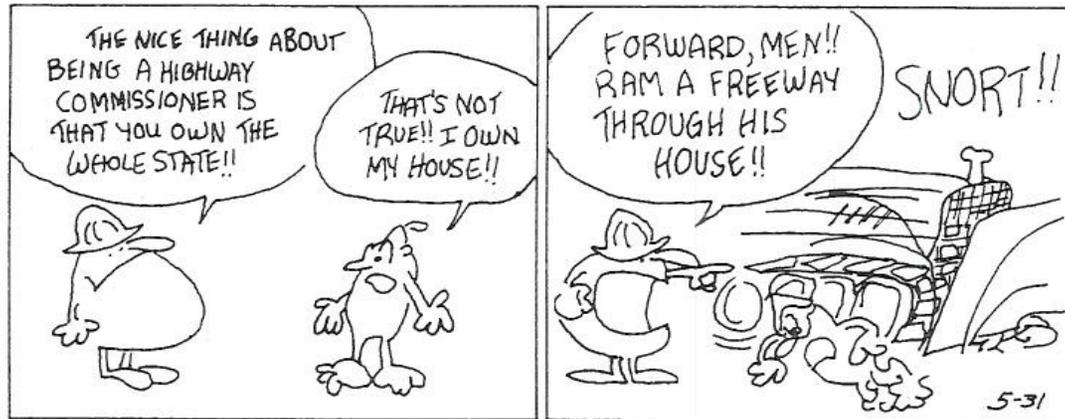
REMEDIATION FUNDING

- Grants (TBA, Assessment Grants, Cleanup Grants, State Grant Programs, ARRA Funds)
- Loans (RLF)
- Reimbursement Programs (USTCF)
- Orphan Funding (ERAP)

CREATIVE TRANSACTION STRUCTURES

- Vertical Parceling
- Double Escrow
- Assignment of Contract Rights
- Assignment of Rights to Grants, Reimbursement Funding, Contribution from RPs
- Partnerships between Municipality and Developer (PDA)

EMINENT DOMAIN



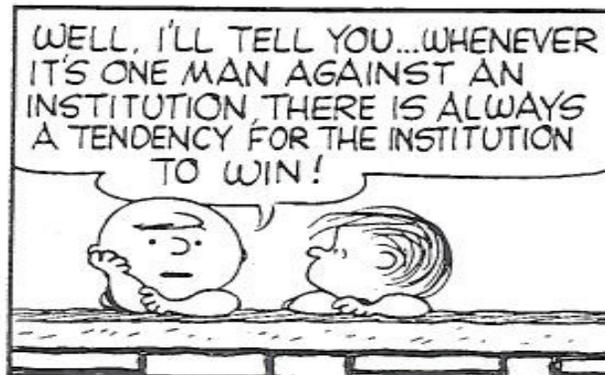
EMINENT DOMAIN

- The Power of Eminent Domain is an inherent attribute of sovereignty.
- This sovereign power has been described as universally recognized and necessary to the very existence of government.
- TWO LIMITATIONS
 - (1) Taking must be for a Public Use.
 - (2) Just Compensation must be paid.

EMINENT DOMAIN

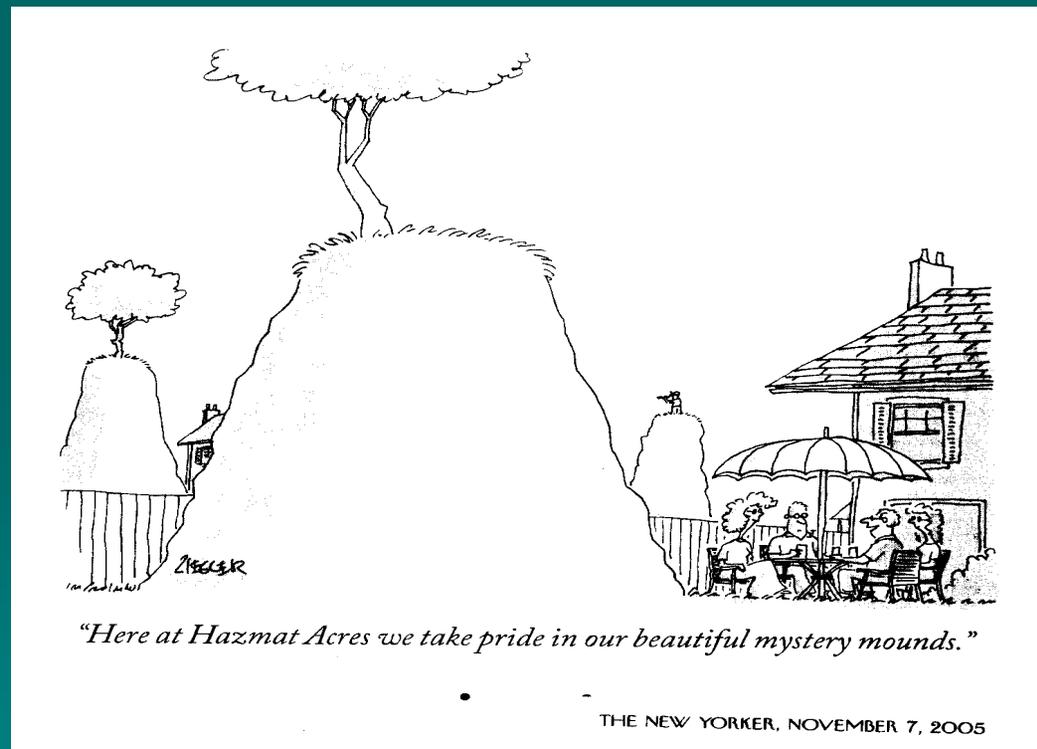
- Defenses to Eminent Domain Action
 - (1) No Public Use
 - (2) Not Necessary
 - (3) Procedural

EMINENT DOMAIN



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DESIGN AND BUILD THE PROJECT SO AS TO MINIMIZE THE ENVIRONMENTAL COST



REAL WORLD EXAMPLES

- Project 1: (San Diego, CA)
 - Site contaminated – total cost to remediate: \$2.8 million
 - Developer partnered with redevelopment agency (PDA)
 - Agency used Polanco to bring RPs to table
 - Developer applied and obtained grants totaling \$1.5million
 - Developer recovered from RPs (\$1.15 million)
 - Out of pocket: \$150,000

REAL WORLD EXAMPLES

➤ Project 1:

- Polanco immunity provided to agency and developers
- Property sold from D1 to D2; parties allocated cost recovery, liability in contract
- Escrow hold back used to pay for cleanup

REAL WORLD EXAMPLES

- Project 2: (Santa Cruz, CA)
 - Municipality used eminent domain to facilitate acquisition
 - Purchase contract negotiated between private owner and municipality
 - Purchase contract capped exposure for environmental liabilities
 - Clean up funded through establishment of escrow account for holdback of some purchase funds
 - Pursued cleanup through ERAP program
 - Obtained DTSC allocation of liability against other RPs
 - Obtained determination that site was an “orphan” making it eligible to receive orphan funding for remediation

REAL WORLD EXAMPLES

- Project 3: (San Diego and San Francisco, CA)
 - Vertical Parceling to limit liability to Buyer
 - Surface and air ownership sold to Buyer
 - Subsurface ownership retained by Seller until cleanup was completed