
AAPA

Real Estate Seminar

Duane E. Bennett
Port Attorney
San Diego Unified Port District

Scenario

- Ace Hotel Developers (“AHD”) executes an agreement with the Port of Apple Valley to build a 400 room hotel on Port property.
 - AHD and the Port agree on the price and terms of a development agreement and future lease terms.
 - The site that AHD will develop was once used as a shipyard operation by former Port tenant Moon Shipyard. As a result of the uses, the site is contaminated with PCB’s, metals and copper. The property is contaminated on the land side and the contamination extends to the adjacent waters and sediments. The extent of the contamination is unknown to the Port.
 - There was no environmental conditions or indemnity language in the Moon Shipyard’s lease.
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Scenario

- AHD expresses concern over the condition of the site and insists that the Port indemnify the developer as to the environmental condition of the site.
 - Since there was no indemnity in with Moon Shipyard, the Port agreed to voluntarily remediate or clean up the development site.
 - AHD also has plans to assign its interest to a large unidentified hotel chain as development plans proceed.
 - AHD believes that the assignment should ultimately increase its profit, and lessen lease and rental costs despite the terms of the development agreement establishing fixed rent and various lease terms for fifty years.
 - AHD believes that it will receive a rent reduction once the hotel is built regardless of the appraised value of the developed site.
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Scenario Issues

1. What issues are presented by the scenario?
 2. What type of analysis should occur to resolve the issues?
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1. Indemnity Concerns

- Real property agreements or leases should contain appropriate indemnity language apportioning risks, responsibility and liability for accidents, damages and/or lawsuits
 - Such language should be drafted to protect, defend and pay for any damages or losses on behalf of the Port landlord
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Purpose of Indemnity Provisions

- Indemnity clauses contain language that address monetary losses, attorneys fees, defense costs, etc. that result from claims or lawsuits
- The clauses may also address the duty to provide an immediate defense as well as payment of attorneys' fees and costs
- *In particular, indemnity provisions should contain language that addresses environmental contamination and remediation responsibilities*

Sample General Indemnity Language

Lessee shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Lessor and its officers, employees, and agents for any and all liability, claims, judgments, damages, proceeding, orders, directives, costs, including reasonable attorneys' fees, or demands arising directly or indirectly out of the obligations undertaken in connection with this lease, or Lessee's use, occupancy, possession or operation of the leased Premises, except claims or litigation arising through the sole negligence or willful misconduct of Lessor...

Sample Environmental Indemnity Language

Lessee shall, at Lessee's sole expense and with counsel reasonably acceptable to Lessor, indemnify, defend, and hold harmless Lessor and Lessor's directors, officers, employees, partners, affiliates, agents, successors, and assigns with respect to all losses, including reasonable attorneys' fees and environmental consultants' fees, arising out of or resulting from Lessees occupancy or use of the Leased Premises, or violation of any Environmental Law, by Lessee or Lessee's agents, assignees, sublessees, contractors, or invitees...This indemnification shall survive the expiration or termination of this Lease...

2. Environmental Conditions of Real Property

- Real estate leases and property developments should account for existing and future environmental conditions of a property site
 - Baseline environmental studies should be performed to establish the existing condition of a real estate site
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Problems with Contaminated Sites

- Inability to transfer, lease or develop the site
 - Huge expenses associated with environmental remediation
 - Costly environmental litigation
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Federal Clean Water Act

- “Clean Water Act” circumscribes many of the federal and state regulations governing harbors and navigable waters (33 U.S.C. §§1251 et seq.)
 - Contamination in waters, harbors, bays and oceans remains an important issue
 - Operators of Ports, harbors and bays must comply with federal and state standards regarding prevention and clean-up of environmental contamination within navigable and bay waters
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Regulatory Agencies

- U.S. Department of Fish and Wildlife
 - U.S. Environmental Protection Agency
 - Army Corp of Engineers
 - Coastal Commissions
- Environmental protection organizations also play an important role in environmental matters, and may have great influence over the decisions of regulators
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Theories of Environmental Litigation

- Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) lawsuits: seek recovery of clean up funds from “responsible parties”
(42 U.S.C. §§39601 et seq.)
- Nuisance Actions: may be filed to obtain damage recovery or clean-up of contaminated property
- State Law Actions: may be filed to obtain relief or in efforts to mandate clean-up of contaminated property from those responsible

The Costs of Environmental Litigation

- Clean-up orders from regulators may identify “responsible parties” for contamination, and direct levels of clean-up
 - Such orders quickly become contentious and may trigger expensive clean-up obligations
 - CERCLA litigations seeks contribution from polluters for the costs of remediation
 - Where tenants cause contamination, they should be responsible for the remediation
 - Properly drafted environmental language apportioning responsibility for remediation is critical to avoiding costly litigation
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CERCLA PROVISIONS

- Section 113(f)(1) provides an action for contribution “during or following any civil action” under CERCLA sections 106 or 107
 - A section 113 (f)(3) contribution action may be brought if a party has resolved its liability to the United States or a State for a response action in an administrative or judicially approved settlement
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Cooper v. Aviall

534 U.S 157 (2004)

- Litigation commenced over cleanup costs related to four aircraft engine facilities that the defendant Cooper sold to Aviall.
 - Aviall discovered contamination and was directed to clean up the site.
 - Aviall filed an action against Cooper for the clean up.
 - The U.S. Supreme Court held that the language of section 113(f)(1) limited contribution actions to those filed after a civil action.
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Effect on Voluntary Clean-ups

- Cooper makes it clear that potentially responsible parties that voluntarily incur clean-up costs cannot pursue contribution under section 113 (f)
- Many questions still remain as to whether recovery can be obtained under other sections, whether an administrative order from a regulatory agency constitutes a “civil action”, etc.
- Government Clean-ups: It is now unclear as to whether government can recover damages or contribution for voluntary clean-up actions
- States are not in agreement as to this aspect

Environmental Conditions

Real property agreements and leases should also contain provisions as to responsibility for any necessary environmental remediation

Sample Environmental Conditions Clause

If the presence of any Hazardous Material brought onto the Leased Premises by Lessee or Lessee's employees, agents, sublessees, contractors, or invitees, or generated by the same during the term of this Lease, results in contamination of the Leased premises, adjacent properties of the Bay, Lessee shall promptly take all necessary actions, at Lessee's sole expense, to remove or remediate such Hazardous Materials...

3. Lease Assignments

- Port landlords should have the ability to consent to lease transfers or assignments
 - Proper drafting is critical as to retaining the ability to consent to assignments
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Assignments

- Consent to assignments is important for purposes of assessing the ability of potential developers/tenants to satisfy the terms of a development agreement or lease
- Financial responsibility must be satisfied
- Ability of the assignee to fulfill all terms and conditions is also an issue
- Port landlord should retain the ability in development and leases to consent to assignments

Sample Assignment Provision

Lessee shall not, without the prior written consent of Lessor:

- (a) Assign or transfer the whole or any part of this lease therein;
- (b) Sublease the whole or any part of the Leased Premises;
- (c) Permit transfer of the Lease or possession of the Leased premises by merger, consolidation, or dissolution of Lessee;
- (d) Permit hypothecation, pledge, encumbrance, transfer or sale, voluntary or involuntary, in whole or in part, of this Lease or any interest therein; or
- (e) Permit the occupancy of the whole or any part of the Leased Premises by any other person or entity.

Words to Avoid as to Assignments and Transfers

“Consent shall not be unreasonably withheld”

4. Rent Negotiations

- Should be driven by market rate analyses
 - May consider the economic climate
 - Now being impacted by the economic downturn
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Market Rent

- Rent and real property negotiations are defensible when driven by market rates and sound economic studies
 - A variety of methods may be used to derive rent or development terms, including various appraisal methods
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Some Different Types of Rent

1. Rent may be based upon square footage
2. Rent may be based on flat rate appraisals
3. Rent may be based on percentage of sales revenue

Lease Disputes

- Disputes may arise over lease terms or rent calculations
 - Disputes may be resolved through mediations, arbitrations or litigation depending on lease terms
 - Leases should be clearly drafted to account for rent/lease disputes and should provide a clear dispute methodology
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Lease Arbitrations

- *Traditional arbitration*: decides rent disputes based upon numerous factors and a compromise rationale
 - *Baseball style arbitration*: decides rent disputes in favor of one party or the other
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