

# Governor Signs AB 389 Providing Liability Relief To Purchasers of Brownfields Sites

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One of the biggest obstacles to the development of “Brownfields Sites” by redevelopment agencies and developers has been the potential liability under California’s environmental laws when a contaminated property is acquired. Assembly Bill 389, entitled the “California Land Reuse and Revitalization Act of 2004” (the “Act”), authored by Assembly Member Cindy Montañez and Senators Gilbert Cedillo and Byron Sher, and signed by the Governor on September 23, provides liability relief both to purchasers of contaminated properties and owners of properties adjoining contaminated sites.

The Act began its life in the Legislature as Senator Cedillo’s Senate Bill 493. It was primarily intended to extend the CERCLA liability protections under the 2002 federal “Small Business Liability Relief and Brownfields Revitalization Act” to purchasers of California Brownfields sites. It also seeks to provide broader immunities under California environmental laws if the purchaser actually cleans up the site under the supervision of a California regulatory agency.

Under CERCLA and similar California laws, the current owner of a property or a buyer can potentially be held financially responsible for the remediation of contamination found on a property, even if that owner did not actually dispose of any hazardous substances on the property. The liability protections under the 2002 federal amendments to CERCLA did not modify a property owner’s potential liability under similar California environmental laws, such as under the California Hazardous Substances Account Act, the Porter–Cologne Water Quality Control Act, or common law nuisance and trespass claims. The Act is intended to close that liability gap.

Although the terms of the Act are quite complex and require careful study, in summary, the Act amends the Health & Safety Code to provide that (1) an “Innocent Landowner,” (2) a “Bona Fide Prospective Purchaser,” or, (3) a “Contiguous Property Owner” will not be liable for response costs or damage claims under specified state laws for contamination on, under, or adjacent to that property, if that person performs certain environmental assessment and remedial actions under regulatory supervision. The bill also prevents a regulatory agency from later requiring additional remedial actions by an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner who has already taken the necessary steps to qualify for the immunities under the Act.

The liability relief under AB 389 is not a “free pass;” to qualify for the immunities, a purchaser or other person seeking the immunities must first appropriately investigate the environmental

condition of the property prior to the purchase. If contamination is found, that person must then take appropriate steps to remediate the contamination, as directed by one of California’s environmental regulatory agencies.

The first thing a prospective purchaser (or other person seeking to qualify for the immunities) must do is enter into an oversight agreement with a regulatory agency and submit a proposed site assessment plan. Prior to acquisition, a Phase I Environmental Assessment must be conducted in conformance with American Society for Testing and Materials (ASTM) Standard E1527-00. Once the U.S. Environmental Protection Agency’s recently finalized “All Appropriate Inquiries” regulations (40 CFR Part 312) become effective, those standards will supersede the ASTM standard for site assessments. For residential properties, all that is necessary is a site inspection and title search. A report of the site assessment is then submitted to the supervising agency. The agency determines – based on the report – whether a response action is necessary, taking into account the intended use of the property.

If contamination is discovered as a result of an environmental site assessment, the innocent landowner, bona fide prospective purchaser, or contiguous property owner must exercise “Appropriate Care.” In defining “Appropriate Care,” the Act includes the performance of a response action that meets all of the following conditions: (1) the response action must be determined by a state regulatory agency to be necessary to prevent an “unreasonable risk” to human health or the environment; (2) the response action must be performed in accordance with a written plan approved by the regulatory agency; and, (3) the approved plan must include a provision for oversight and verification of the response action by the regulatory agency.

The owner acquiring the property must also give all legally required notices if contamination is discovered at the site, must cooperate with regulatory agencies, and must comply with any land use controls established with respect to the site, such as restrictions on the type of use of the property or maintenance of remedial facilities.

A property owner who completes all of these steps will be entitled to immunities from claims under specified “Applicable Law,” such as nuisance claims, actions under the Fish & Game Code, the Water Code, the Underground Storage Tank and Aboveground Storage Tank provisions of the Health & Safety Code, the Hazardous Substances Account Act, and Health & Safety Code § 25401, et seq. With certain exceptions, the immunities will also apply to lawsuits by state and local agencies as well as third parties, either directly or by way of contribution actions. These immunities attach upon approval of a remedial

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action plan by the supervising agency and remain in effect unless the property owner receives a written notice of non-compliance from the agency.

The Act also bars a regulatory agency from requiring the property owner to conduct additional remedial action unless the agency is unable to compel other potentially responsible parties to take the action and the conditions on the property endanger human health or the environment. One notable provision allows a property owner who has established immunity to recover attorneys' fees from lawsuits in connection with the contamination. AB 389 also provides for a regulatory agency lien on other property or other assurance of payment for unrecovered response costs.

At the request of California Redevelopment Association, the Act includes important exceptions to the scope of the proposed immunities from the standpoint of redevelopment agencies. The Act does not provide immunity from actions by redevelopment agencies under the Polanco Redevelopment Act. Furthermore, an agency acquiring a property or taking it by eminent domain can consider the impact on the value of the property resulting from the contamination at the site. In addition, the bill does not modify or limit the existing authority of a state or local agency to impose a condition on the issuance of a discretionary permit relating to the development, use, or occupancy of any site. In other words, a city or county may not be restricted from imposing clean up requirements as a condition for developing a property.

The Act requires the Department of Toxic Substances Control (DTSC), the State Water Resources Control Board (SWRCB), and the Regional Water Quality Control Board (RWQCB) to establish form agreements to implement its provisions.

Another important element of the Act is the requirement that the agencies expand their websites to allow access to information about Brownfields and other cleanup sites through a single website.

AB 389 will remain in effect for only five years – until January 1, 2010 – unless the Legislature further extends it prior to that date. However, the immunities obtained under the Act will continue after January 2010.

In passing AB 389, the Legislature has attempted to remove a serious impediment to redevelopment of abandoned and neglected urban areas by trying to close the liability gap between California and federal law. However, the Act is not perfect and CRA will be involved in future efforts to both address any unresolved issues raised by the Act and to implement its terms. CRA will continue to participate in the diverse efforts to reclaim brownfields and to strengthen the tools available to local agencies.

RJ

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