REAL ESTATE, LAND USE, CONSTRUCTION, AND ENVIRONMENTAL LAW

GroundBreaking News™

Zoning the Ocean for Wave Energy

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Oregon's Land Conservation and Development Commission recently adopted an amendment to Oregon's Territorial Sea Plan specifying how and where wave energy can develop in state waters. This applies in Oregon's territorial sea, which includes the areas of the Pacific Ocean within three miles of Oregon's coastline. The wave energy plan is the result of a planning process that brought ocean stakeholders and the public together to identify ocean characteristics and sensitive areas. Miller Nash client Oregon Wave Energy Trust ("OWET") participated extensively in the planning process. Soon after the plan's passage, OWET Executive Director Jason Busch reflected that

> "the Territorial Sea Plan is a great step forward for Oregon. It strikes the correct balance between promoting the nascent ocean renewable energy industry and protecting the ocean and its users. Additionally, it provides a clear regulatory pathway for developers, and provides adequate space to support multiple technologies in areas specifically intended for wave energy development."

The wave energy plan is unique in several regards. During the planning process, detailed spatial data was compiled and mapped regarding sensitive ocean features such as endangered species, recreational areas, kelp beds, productive fishing locations, view corridors, and many other characteristics. This spatial data was then used to create regulatory maps that look and function like zoning maps. Areas that minimize negative impacts and had features needed for renewable wave energy were identified as Renewable Energy Facility Site Suitability Areas ("REFSSAs").

Four REFSSAs were identified, constituting about 25 square nautical miles in total. These are the easiest areas for siting renewable wave energy projects. Additionally, secondary wave energy development areas were identified and called Resources and Uses Management Areas ("RUMAs"). RUMAs make up approximately 135 square miles of ocean and require projects to avoid significant adverse impacts to other resources and users. For people familiar with terrestrial permitting, RUMAs are not dissimilar from a conditional use zone.

Governor Kitzhaber, whose office was instrumental in moving the plan forward, commented on the day of passage:

> "Oregon has long been a leader in renewable energy development, and energy issues will have the single greatest impact on Oregon in the coming decade. This balanced proposal shows Oregon can thoughtfully support this emerging and promising industry while protecting our coastal communities' quality of life, our commercial and recreational fisheries, and a coastline that all Oregonians treasure."

Oregon has competitive advantages that give it a unique opportunity to lead the nation in wave energy, including:

- physical characteristics in its territorial sea and the type of waves that are among the most

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New Environmental Mitigation Tools in a Revived Economy

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While the economy may remain stagnant, regulations governing environmental contamination continue to develop, particularly as they concern "brownfields."

Brownfields are vacant or underused properties where actual or perceived environmental contamination complicates expansion or redevelopment. Prospective purchasers of brownfields may decline to buy or develop land out of fear of the potentially high costs of investigating and cleaning up properties. Wary of these concerns and their impacts on economic development, in 2002 Congress passed laws to protect prospective purchasers from liability arising out of such known contamination. Of particular note is the bona fide prospective purchaser ("BFPP") defense under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Under this federal defense, qualified prospective purchasers are exempted from liability associated with known environmental contamination. But states such as Oregon have lagged behind and have not adopted the statutory BFPP defense. Instead, they have developed administrative programs to fill in the gaps.

Since 2008, when the economy came to a halt, there have been several legal developments that should be of interest to anyone who will be involved in any kind of property transactions involving an interest in a brownfield. This article highlights two notable developments that could be key tools in a revived economy to further mitigate risks associated with brownfields.

Expansion of State Protection of Prospective Purchasers Through an Order

In Oregon, the Department of Environmental Quality ("DEQ") can administratively grant to prospective purchasers of brownfields limited protection in a contract called the prospective purchaser agreement (the "PPA"). Furthermore, until 2011, DEQ could release prospective purchasers only from claims that the agency may have had against the purchasers.

As a product of the 2011 legislative session, Oregon expanded the PPA program by giving DEQ the additional administrative authority to also grant contribution protection under state law. ORS 465.327(4). The contribution protection relieves purchasers of state liability associated with contamination that is known and existed before the date of the property acquisition. Under this new law, DEQ can now grant this protection through an administrative settlement in the form of a consent order.

"This article highlights two notable developments that could be key tools in a revived economy to further mitigate risks associated with brownfields."

This new authority adds to DEQ's existing authority of granting contribution protection to prospective purchasers through a judicial settlement by way of a consent judgment. This process requires parties, after an administrative public hearing process, to enter a formal court proceeding whereby DEQ files a complaint along with the consent judgment and requests the judge to accept the proposed settlement. Parties opposing the settlement can object during the administrative comment period and then later file a motion to intervene during the judicial proceeding.

The requirements to secure contribution protection through an administrative settlement are similar to those required of a judicial settlement. First, prospective purchasers are expected to take some remedial actions to address current contamination. Second, the terms of the proposed settlement, including the contribution protection, are subject to public scrutiny. In the case of the consent order, DEQ must provide for a 30-day public-comment period. During this period, parties opposing the settlement can submit comments.

Despite these similarities, the 2011 law offers prospective purchasers of brownfields a new option. Now, they can settle potential liability under state law administratively either with the limited protection of the PPA or more comprehensively with the consent order. Prospective purchasers also continue to have the option to pursue a comprehensive judicial settlement.

Expansion of Federal BFPP Defense to Tenants

The second notable development came in late 2012, when the U.S. Environmental Protection Agency ("EPA") issued a revised guidance that expands the BFPP defense for tenants. Specifically, the revised guidance states that EPA will exercise its enforcement discretion on a site-specific basis to apply the defense to all tenants that are otherwise independently fulfilling the statutory BFPP requirements.

That means that a tenant would not be statutorily liable under federal CERCLA for known environmental con-

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Be Prepared for "Call Before You Dig" Law Changes

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Washington enacted its Underground Utilities Act, known as the "Call Before You Dig" law, in 1984, and now every state in the nation has enacted a similar law. The law, in all states, generally provides that anyone excavating must call the 811 utility-locate hotline before digging begins to have all utilities located and marked. According to Common Ground Alliance, which monitors 811 and related services nationwide, more than 300,000 potential damage incidents involving underground utilities were reported in 2011, and more than 25 percent of the incidents involved a failure to call before digging. Although Call Before You Dig has been effective in decreasing damage to underground utilities, enforcement in Washington has been sporadic and lax. But as of January 1, the law has changed. Washington's previous laissez-faire approach has been replaced by a strict new regime, which will result in more oversight, more enforcement, and more penalties. Are you ready?

The new law has stricter requirements for both excavators and utilities. For instance, while excavators still have to provide two to ten days' notice of the proposed excavation, they now also must mark the excavation area in white paint before calling, must maintain utility markings for the lesser of the completion of the project or 45 days, and are explicitly prohibited from digging until the locations of all known underground utilities are marked or they have been provided with the best available information regarding known utilities that cannot be precisely located. Project owners still have a duty to identify known utilities in their bidding or contract documents, and excavators still have a duty to use reasonable care to avoid damaging utilities, including by determining the precise location of marked utilities.

Similarly, while utilities still must respond to a utility-locate request within two days, there are now stricter marking requirements, an explicit requirement to provide the best possible information regarding the presence of potentially unlocatable underground utilities, and a requirement generally to identify appurtenances and service laterals in most cases. Further, all utilities are now required to subscribe to their local one-number locator service, meaning that a call to 811 should now provide notice to all utilities in the area of the proposed excavation. Additionally, local governments now have an affirmative duty to notify gas pipeline operators when a permit is issued allowing construction or excavation within 100 feet of a gas pipeline.

The biggest changes to the law, however, are on the enforcement side. Previously, while the Washington State Utilities and Transportation Commission the ("WUTC") had some enforcement authority over the law as it applied to gas pipelines, no agency was explicitly charged with enforcing the law with respect to other types of buried utilities. The new law creates a 13-member safety committee made up of representatives from the construction, excavation, and utilities sectors, along with local governments and the WUTC. The safety committee is authorized to review complaints regarding alleged violations of the new law, and to refer actionable violations to the WUTC for enforcement proceedings. While it is not clear that the safety committee has authority to investigate violations independently, as opposed to responding to reports of violations, the new law also has strict damage-reporting requirements, which require utilities or excavators that observe any damage

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Potential Relief After Untimely Exercising an Extension Option in a Commercial Lease

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The option to extend or renew a commercial lease is a powerful tool for tenants to possess. Such an option offers a commercial tenant the ability to remain at the leased location after the lease's primary term has expired if the tenant so desires. To determine how and when to exercise an option, the tenant must carefully read and comply with the terms of its lease. Unfortunately, situations arise when a tenant inadvertently fails to timely exercise its option in accordance with the terms of the lease. In such instances, the tenant will likely lose its option. Washington courts faced with this very issue have, in limited circumstances, granted the tenant additional time to exercise the option.

In Washington, the general rule is that a tenant must strictly comply with the terms of the lease when exercising an option to extend; the acceptance must be "definite, unequivocal, [and] unqualified".[1] In other words, a tenant must exercise its option within the agreed-upon period found in the lease. But Washington courts have granted a little flexibility around this rule. Special circumstances may warrant an equitable extension of time for a commercial tenant to exercise its option.[2] But such an extension is not common.

Factors that Washington courts have looked at when granting an equitable extension of time for commercial tenants are as follows: whether the tenant was "grossly negligent" when it failed to timely exercise the option, whether an inequitable forfeiture will result, whether the landlord was harmed or changed its position as a result of the tenant's failure to exercise the option, how long the lease was in effect, and whether the tenant unduly delayed in exercising the option.[3]

Certainly, courts do not want to see any gross negligence or improper acts on the part of the tenant that caused it to miss its deadline. And a tenant's providing valuable improvements to the leased property with the intent to stay at the property through the option period will support an argument that an inequitable forfeiture would result if an extension is not granted. A landlord that is unharmed and unaffected by the tenant's failure to exercise its option should offer support for an equitable extension. Courts also like to see long-term leases when granting an extension. Last, an undue delay by the tenant in exercising its option will work against the tenant's getting an extension.[4] Whether a court will ultimately grant an equitable extension depends on the specific facts of each case.[5] Because courts consider various factors, and decisions are fact-specific, it is difficult to predict when a Washington court will grant an equitable extension.

When a commercial tenant determines that it wants to exercise its option to extend or renew its lease, it should carefully read the terms of the lease and strictly comply with any terms directing how and when to exercise the option. Commercial tenants should set up a system that provides multiple reminders of any impending deadline to exercise an option. And after exercising the option, but before the deadline to do so, the smart tenant might wish to follow up with the landlord in writing to get confirmation that its notice was received. Overall, an option to extend or renew a lease is a very useful tool for a

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[1] *Recreational Equip., Inc. v. World Wrapps Nw.*, 165 Wn. App. 553, 558-59, 266 P.3d 924 (2011) (internal quotation marks and citation omitted).
[2] *Id.* at 560.
[3] *Id.*; *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 612-13, 605 P.2d 334 (1979).
[4] *Recreational Equip., Inc.*, 165 Wn. App. at 560-68; *Wharf Rest., Inc.*, 24 Wn. App. at 612-13.
[5] *Recreational Equip., Inc.*, 165 Wn. App. at 559 (citation omitted).

suitable for wave energy development in the world;

- a manufacturing base with supply lines and personnel capable of making wave energy devices;
- close proximity to energy infrastructure, including substations operating below capacity;
- a wave energy plan that has identified areas most suited for wave energy and least conflicting with other ocean users; and
- a governor who has identified renewable wave energy permitting as an area for regulatory simplification.

For Oregon to fulfill its leadership potential in wave energy, it should follow up on the wave energy planning effort and ensure that the permitting process is simple for these facilities, especially in REFSSAs. The REFSSAs were identified because they minimize negative impacts on resources and other ocean users. They constitute less than 2 percent of the territorial sea. Governor Kitzhaber recently identified wave energy as one of four pilot projects in his Regulatory Streamlining and Simplification Project. The project proposal calls for state agencies to "revisit their authorization processes and identify and implement policies and procedures to expedite [wave energy] projects in areas of the territorial sea that have been identified as marine resource development areas." The Governor's call to action provides the right opportunity at the right time for Oregon to make its permitting process simpler for this renewable energy source.

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New Environmental Mitigation . . . | Continued from page 2

tamination if: (1) before the execution of the lease, the tenants conducted all appropriate inquiries ("AAI") to reveal the environmental contamination, and (2) after the execution of the lease, the tenants comply with other BFPP defense criteria, including taking all necessary reasonable steps to address certain contamination, not causing any release, complying with agency information requests, and not impeding any ongoing response action.

Under a prior 2009 guidance, EPA strictly applied the statutory BFPP definition and recognized the BFPP defense for two types of tenants:

1. Tenants with indicia of ownership. Tenants whose leases give sufficient indicia of ownership are qualified as BFPPs. Factors supporting a finding of ownership include the length of the leases, range of permitted uses, extent to which the tenants need permission from the owners for certain actions, the owners' reserved property rights, and responsibility for taxes, insurance, and repairs.

2. Tenants of owners who are BFPPs. Tenants who lease from owners who satisfy the BFPP criteria may qualify as BFPPs. Those tenants remain BFPPs for as long as owners maintain compliance with the criteria, and tenants do not have an independent duty to implement BFPP responsibilities, including AAI.

The 2012 guidance expanded the interpretation of the BFPP defense by imposing independent obligations on tenants, thereby giving them more control over their own fate. Thus, anyone looking to lease industrial properties, or commercial properties that may have had industrial uses, should consider at least conducting a Phase I environmental site assessment, rather than relying on what the owner might have done.

Conclusion

There are now two key tools to help parties deal with environmental risks associated with brownfields. While useful, these tools are not without qualifiers. But when they are considered carefully as part of a strategic plan, they can be a critical component to getting a deal closed.

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Be Prepared for "Call Before You Dig" . . . | Continued from page 3

to an underground utility to report the damage within 45 days of the event. Washington is one of only about a dozen states to implement such mandatory reporting. The WUTC has now also set up an online Damage Information Reporting Tool (DIRT) that allows anyone to report such damage or suspected violations anonymously.

In addition to clarifying and strengthening enforcement authority, the new law also increases penalties for violations. Hence, Washington State can now fine violators up to $1,000 for the first violation and up to $5,000 for subsequent violations in a three-year period even if there is no damage to the utility from a violation. Damage to a gas pipeline can result in a $10,000 fine, or even conviction for a gross misdemeanor, which can mean up to 30 days in jail. The new law also continues the State's authority to recover three times the cost of repair from any excavator who willfully or maliciously damages a marked underground utility. If an underground utility is damaged as a result of a failure to comply with all the requirements of the new law, the party that failed to comply is liable not only for such damages, but also for the other party's reasonable attorney fees if any lawsuit is brought.

So what is a contractor to do? Call early and call often! Calling before you dig is just the start—constant coordination with utility owners is the best insurance a contractor has for avoiding costly damage to underground utilities. Indeed, the new law explicitly allows excavators to receive reasonable compensation from a utility owner for costs incurred by the contractor because of the utility owner's failure to comply with its duties under the law (though the new law also allows a utility owner to recover its costs from a contractor who fails to comply). There will be more enforcement of the new Call Before You Dig law, and even innocent violations can become costly. So before you break ground, break out your cell phone and call 811. You'll be happy you did.

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commercial tenant. So a commercial tenant with such an option should ensure that it gets the benefit of its bargain by complying with the lease terms when exercising it. The goal is to avoid putting oneself in a situation of being forced to make an equitable-extension argument to a court.

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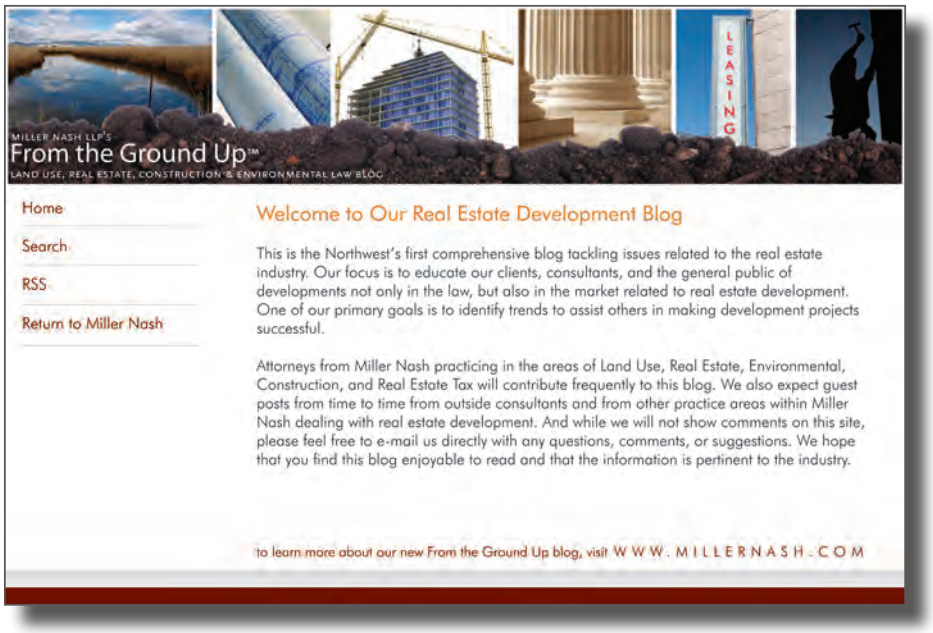

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