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FALL 2004

a newsletter for the real estate industry

PILLSBURY WINTHROP LLP Real Estate

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QUESTIONS AND ANSWERS WITH

URBAN LAND INSTITUTE

PRESIDENT **RICK ROSAN**

Richard M. Rosan
President, Urban Land Institute

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The Urban Land Institute ("ULI") has long provided a multi-disciplinary real estate forum for professionals all over the globe. Today, ULI is widely recognized as the premier real estate research organization in the world, with a staff of approximately 110 full-time employees -- including research and education specialists, meeting planners, writers, publication experts, a marketing team and a professional office management group. With its own rapidly growing network of global real estate specialists, Pillsbury Winthrop LLP has teamed up with ULI on many fronts. Pillsbury Winthrop LLP is proud to be a Corporate Sponsor of this year's annual ULI Fall Meeting being held on November 2-5 in New York City.

Richard M. Rosan has served as President of ULI for the past three years. He spent the previous six years serving as Executive Vice President and Chief Operating Officer of ULI. Mr. Rosan is an architect and a Fellow of the American Institute of Architects. Prior to his service at ULI, he spent 22 years in New York City in several capacities, including 12 years with the City of New York where he ultimately served as the City's Economic Development Director.

Jim Rishwain, Real Estate Section Leader of Pillsbury Winthrop, recently talked to Mr. Rosan about ULI and its role in the real estate world.

How did ULI get started? Is there a story behind the inception of ULI? It was started in 1936 by a group from the National Association of Realtors, who believed there needed to be some research in real estate development. In order to facilitate this research, they created the Urban Land Institute. It was established in Chicago. And at some time before the Second World War, they decided that they would like to relocate, and they moved the headquarters to Washington, D.C. ULI grew relatively slowly, but it did some very valuable research. As a graduate student years ago, I remember looking at some of the papers that were done in the 40's and 50's, and finding that ULI had created the council program early on in the 50's. And that was really the strength of the organization -- having product councils, people in interdisciplinary modes who would get together and serve on a council. And we now have 50 councils. To illustrate the strength of the program, we've gone from only one council to four councils in about two-and-a-half years in Europe.

How did you personally get involved in ULI? I personally got involved with ULI as a member when I was in the real estate business in New York, 25 years ago, and I have worked as the CEO since 1992. Before that, I was a member of a council and I used to go to the meetings. It's interesting. I think as ULI became a forum for thinking about real estate nationally, I naturally became more involved, because before about 1980, there was very little national real estate. Companies were very local. The financing was local. Their business

(*ULI Interview* continued on page 10)

in lieu of in-lieu fees
MORTGAGE ASSISTANCE PROGRAMS

LEWIS G. FELDMAN DOUGLAS A. PRAW

With housing prices booming but housing affordability decreasing, municipalities are again considering increases in affordable housing fees. These fees, so-called "in-lieu fees," are the amounts local governments require developers to pay when building market-rate housing. The purpose of these fees is to assist local government in providing affordable housing. However, increasing such in-lieu fees results in a Catch-22: higher in-lieu fees make market-rate housing more expensive to build which, in turn, results in housing becoming even less affordable than before. This possibility leaves many wondering how to leverage current affordable housing exactions to maximize the impact and minimize the need for further increases in affordable housing fees. One answer to this question may be the greater use of mortgage assistance programs.

Many local affordable housing initiatives require 15% of new development to serve the needs of low-income residents. Assuming a 100-unit subdivision, the developer of a project would have to set aside 15 units to house low-income households as a condition to obtaining the right to build 85 market-rate homes. Alternatively, a local agency may require a contribution to the agency's affordable housing stock through the payment of in-lieu fees, i.e., fees payable in-lieu of building affordable housing units themselves. In-lieu fees can be applied to both rental and for-sale housing, and are often calculated as the amount of the monetary gap between what a qualified household can afford to pay for a home and the market cost of that home.

An affordable home is commonly thought of as one that requires the payment of no more than 30% of a family's income towards principal, interest, property taxes, and insurance. For example, in Las Vegas, Nevada, a low-income borrower is considered one who makes $27,150 per year. At 30% of the its annual income, that low-income borrower can spend about $8,145 per year on an affordable residence, which supports a mortgage of approximately $150,000. In Las Vegas, the median price of a home is $269,000, which leaves a gap of $119,000. For a 100-unit subdivision, a project in Las Vegas could be asked to contribute $119,000 per affordable housing unit, or $1,785,000, to subsidize the housing needs of the low-income population.

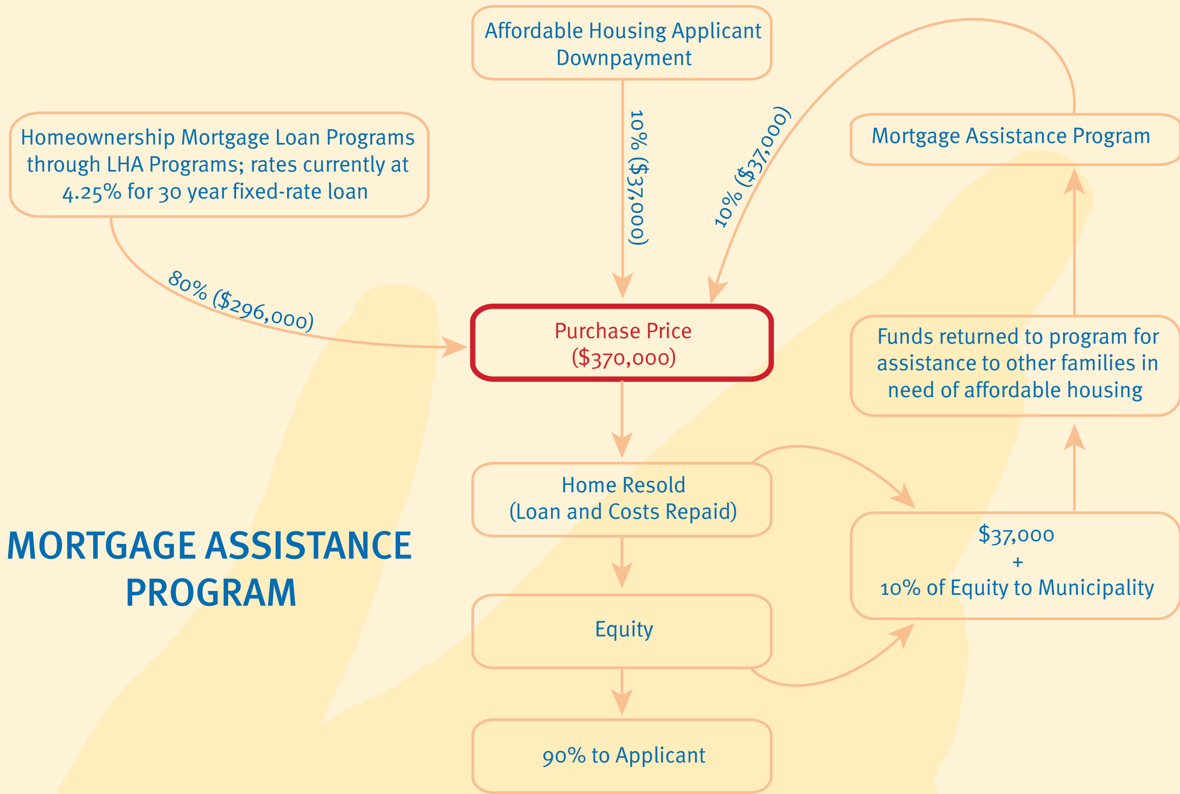
In-lieu fees may prove valuable when looking for an immediate solution to mitigate an affordable rental housing problem on a project-specific basis. The fees paid by the developer can facilitate land write-downs, rental subsidies, or the construction of a few

new single family residences. However, a strong argument can be made that in-lieu fees alone do not provide sufficient impact -- and that leveraging these fees through a low-income mortgage assistance program can accomplish more towards making the dream of homeownership a reality for low-income residents.

> Purchase power and leverage created by a mortgage assistance program far exceeds the impact of an in-lieu fee solution alone.

To understand the benefit of mortgage assistance programs, one must understand the mechanics involved. Customarily, the developer and the municipality team up with a local housing agency ("LHA") sponsoring an affordable housing program that can provide first-position loans to qualifying individuals at below-market interest rates. (A good example of this is the California Housing Finance Agency, or "CHFA" as it is commonly known.) The developer contributes funds to the municipality's mortgage assistance fund which, in turn, provides 10% of the low-income applicant's downpayment on a single-family residence. The applicant provides the balance of the downpayment, and the LHA provides the remainder of the purchase price through a below-market mortgage. (The mortgage is funded with the proceeds of tax-exempt bonds, which carry below-market rates.) Currently, LHAs are offering 30-year fixed rate loans bearing 4% interest rates per annum. This compares favorably against today's market interest rate environment for conventional mortgages which hover around 6% per annum.

The municipality's downpayment loan takes a second position behind the lien of the LHA's mortgage. Eventually, when the applicant sells the home it has purchased (after a regulated period of ownership -- usually 2 to 10 years), the municipality is entitled to repayment of its initial 10% assistance contribution, plus a portion of the increase in the home's equity.



MORTGAGE ASSISTANCE PROGRAM

The repaid funds and the equity earned can then be returned to the downpayment assistance fund and loaned to subsequent low-income households.

As a matter of pure economics, the purchase power and leverage created by a mortgage assistance program far exceeds the impact of an in-lieu fee solution alone. In the 100-unit subdivision example, the $1,785,000 of in-lieu fees collected by the municipality could be used to build 12 homes for low-income buyers. Using that same amount to provide downpayment assistance to low-income buyers would create homeownership for 48 low-income families *or four times the number of beneficiaries* (assuming a median home price of $370,000, with a 10% contribution by the public/private partnership).

Homeownership is more than just the symbol of the American Dream; it is the means to it. According to *Expanding Affordable Homeownership with Private Capital: A Study of the Nehemiah Down Payment Assistance Program*, between 1998-2003, a survey of 115,000 low- to moderate-income households nationwide saw their home equity rise by $2 billion. This rise in equity creates economic well-being for homeowners and affords vital social and cultural capital expansion as well. Mortgage assistance programs that enable homeownership for low- and moderate-income buyers benefit cities, counties, and states through increases in property tax revenues. With federal and state budgets in the red, many local authorities rely on residential property tax revenues to support essential services and to balance local budgets. Increased tax receipts and title and transfer fees that result from new homeownership bolster this tax base.

One size does not fit all. Mortgage assistance programs do not facilitate the provision of rental housing, which is needed for those individuals whose income level does not support a mortgage payment. These programs must be used in concert with rental housing assistance programs, such as mortgage revenue bonds and low-income housing tax credits, to provide safe and sanitary housing for all members of the community, including those with very-low incomes.

When contemplating policies to solve the nation's affordable housing problem, we should all remember that the accumulation of home equity is crucial to the stability of our society. Participants improve their quality of life today -- and tomorrow. A successful mortgage assistance program can expand the number of qualified homebuyers in the low-income demographic and can continue to contribute in this way for an extended period of time. So, before local governments raise the costs of development by increasing in-lieu fees -- and making housing more expensive for everyone -- a wiser use of existing in-lieu exactions through mortgage assistance programs should be seriously considered.

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NEW MARKETS TAX CREDITS: A NEW IDEA FOR AN OLD PROBLEM

JASON A. HOBSON

Real estate projects have been the overwhelming beneficiary of a new federal program called the New Markets Tax Credit (NMTC) - a program designed to encourage private equity investment in low- and moderate-income neighborhoods across the country. In fact, between 60-70% of the $6 billion in NMTCs allocated to date have been or will likely be used to enhance the financing of real estate projects, from office parks and shopping centers to for-sale housing.

The NMTC program, established by Congress as part of the Community Renewal Tax Relief Act of 2000, is intended to attract $15 billion in private equity investment into low-income or economically distressed communities. To date, $6 billion of NMTCs have been allocated during the 2003 and 2004 allocation rounds. Industry participants have recently submitted applications for the 2005 competitive round, where an additional $2 billion in credits will be available. Each of the previous allocation rounds was greatly over-subscribed -- with application requests for $56 billion in NMTCs for an available allocation authority of only $6 billion.

HOW DOES NMTC WORK?

The Community Development Financial Institutions Fund, a division of the U.S. Treasury, administers the program and awards NMTCs annually to qualified for-profit entities, known as community development entities (CDEs). CDEs, in turn, use the NMTCs to raise equity from private investors. Many financial institutions, investment banks, and real estate developers have formed CDEs as a vehicle to raise equity for investment in low- and moderate-income communities. Not-for-profit and community-based groups have also formed "for-profit" entities to act as CDEs in order to access the private equity markets to further their charitable and exempt purposes.

The NMTC program allows an investor to take a 39% federal tax credit over a seven-year period on the amount of equity invested in the CDE. An investor claims the credit at a 5% rate in years 1-3, and at 6% in years 4-7, on its original equity investment in the CDE. The CDE uses the equity proceeds to make qualified low-income community investments in the form of loans to, equity investments in, or financial counseling and other services for businesses and projects located within eligible communities. Real estate projects located within any census tract with a poverty rate of at least 20% will be eligible for financing under this new program.

NMTCs ENHANCE REAL ESTATE FINANCING

The new tax credit should help bridge gaps in financing businesses and real estate developments, and significantly lower the cost of capital. Although the NMTC program has technical tax aspects which must be complied with, NMTC proceeds may be used in common real estate financing structures such as the following:

- mezzanine loans
- predevelopment loans
- construction loans
- acquisition loans
- home purchase loans
- refinancings
- equity investments (e.g., seed capital or preferred equity)
- loan-pooling

NMTCs create the potential for increased returns on the underlying real estate investment, which can make the critical difference for many real estate projects that can generate significant cash flow, but have substantial up-front costs. For example, a shopping center developer has utilized NMTCs to obtain a below-market-rate construction loan, which allowed the developer to pass on the benefits of lower financing costs to tenants in the form of reduced lease rates. As a result, the developer obtained lease commitments from two anchor tenants prior to construction of the new shopping center. In the residential housing industry, home builders and condominium developers are employing the same strategy of passing on the tax benefits from the NMTC financing to individual homeowners. NMTCs may also be combined with other tax credit programs. An owner of an historic commercial building in Chicago used NMTCs in conjunction with another federal tax credit program, the Historic Tax Credit, to generate additional equity to finance a gap in the rehabilitation budget due to increased construction and materials costs.

Real estate projects located within any census tract with a poverty rate of at least 20% will be eligible for financing under this new program.

LEVERAGE EQUITY WITH DEBT

The key to utilizing NMTCs effectively is to leverage debt proceeds with equity to generate a larger investment in a CDE, which, in turn, results in greater NMTCs being earned. The approach is simple, resembling an individual borrowing funds from one source to invest as equity in another entity.

The Internal Revenue Service blessed the "leveraging" approach in its Revenue Ruling 2003-20, permitting a borrower of non-recourse debt to use the loan proceeds to fund an equity investment in a CDE to generate credits. The IRS's ruling does two things. First, it effectively allows an investor to leverage debt to generate additional credits to utilize more effectively the relatively shallow subsidy. Second, the financing structure passed muster with the IRS, which minimizes recapture risk for participants wary from the lack of clear guidance on the use of NMTCs. Not surprisingly, after the release of the revenue ruling, many NMTC deals were structured similarly to the model approved in the IRS's ruling.

Utilizing a leveraged model approach increases the likely return to an income investor and increases the tax credit available to a tax-credit investor. Leveraged transactions closed under the NMTC program typically use a 2:1 or 3:1 ratio of debt to equity to fund an investment in a CDE. Moreover, in transactions utilizing a single upper-tier investor and lender (where the provider of debt also funds an equity investment), an internal allocation of debt and equity funds results in a "leveraged-light model," with a blended return on the overall investment in the CDE.

For all of its benefits, the leveraged model is not without its complications. Tax issues relating to profit motive and economic substance, and practical concerns such as limited security for an upper-tier lender and limits on repayment, have presented concern for industry participants. The complications have resulted in increased costs and consultant fees to close transactions involving NMTCs.

The NMTC program is in its infancy, and, like many other federal tax credit programs in their early years (such as the historic tax credit and low-income housing tax credit programs), it is experiencing elevated costs and investor wariness. With the maturation of the program, and as more deals are closed and additional guidance is gleaned from the IRS on the tax issues, many in the real estate industry believe the NMTC program will provide an additional and effective source of private equity for numerous real estate projects.

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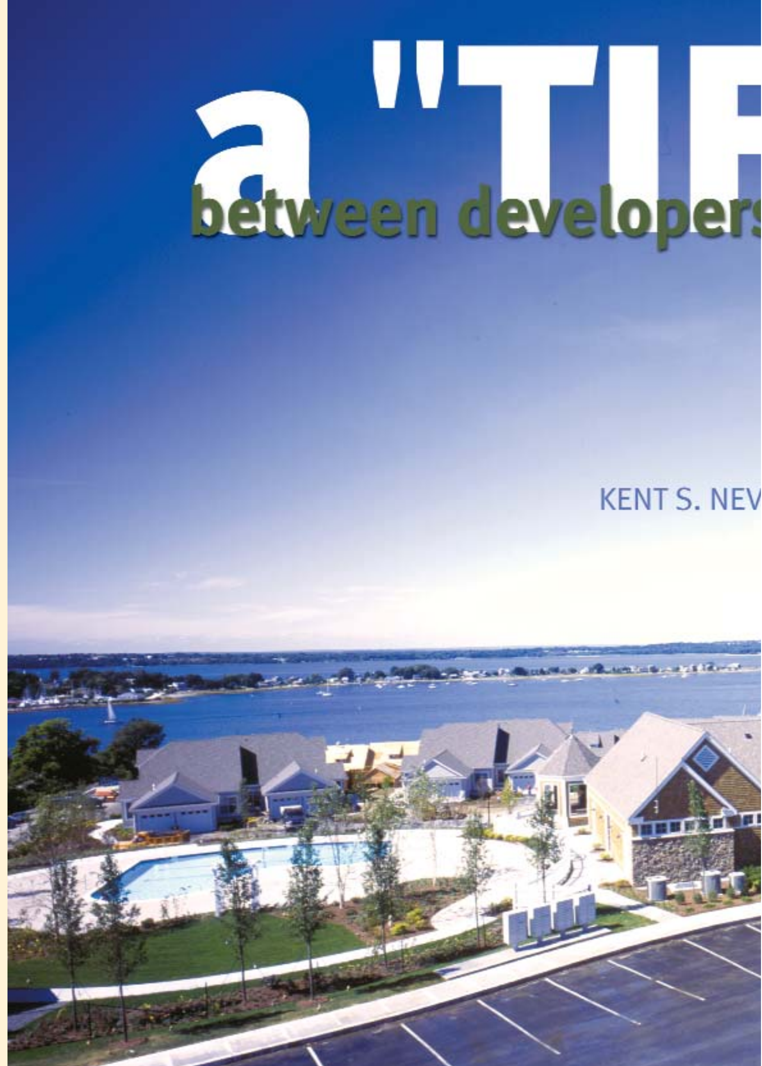

In 2001, Pillsbury Winthrop client Starwood Tiverton, L.L.C. was contemplating the development of an age-restricted residential project with related commercial uses in Tiverton, Rhode Island. To be called the Villages at Mount Hope Bay, the project would be completed on waterfront land that previously housed a contaminated petroleum tank yard. However, the municipality faced several challenges in making the site receptive to development. In addition to the infrastructure for the project itself, the Town of Tiverton badly needed an upgrade of a nearby portion of its sewer system and did not have the funds to pay for it.

To address these obstacles, the town looked to an innovative financing mechanism known as Tax Increment Financing ("TIF") to attract the desired development. It created a tax increment district encompassing the area of the Villages at Mount Hope Bay, and that district issued $8,295,000 in Special Obligation Tax Increment Bonds underwritten by Banc of America Securities. The TIF financing mechanism employs bonds financed only by the increase in tax receipts to be generated by the project, and not by the town's general fund, which allowed the town and the developer the benefit of a new sewer and other improvements in the manner the town could afford.

Karl Frey, formerly the managing director of the Starwood Capital Group-related investor in the project, credits the availability of TIF financing for making the Mount Hope development a reality. "The project might not have succeeded without TIF because of the tremendous infrastructure investment that was needed," he said. "The sewer system, in particular, was a serious impediment. The availability of lower-cost financing for it that didn't compromise the town's finances helped make possible a project that otherwise might have been impossible."

Like Tiverton, municipalities across the country are seeking to control the location of growth in their communities, and to encourage development in blighted areas, but are increasingly stymied by budget crunches. These challenges drive public officials to find new ways to assist with the financing of potential development projects without undermining tight municipal finances.

TIF, which enables cash-strapped cities and towns to enter into self-financing partnerships with private developers to pursue large-scale projects, is one such method. On the books in almost every state, the growing use of TIF in the Northeast -- where it was rarely seen until recently -- demonstrates the spreading recognition of its benefits, particularly in an era of tight governmental purse strings.

WHAT IS TIF?

TIF is a financing technique in which the funding for infrastructure costs and land acquisition through eminent domain is obtained through bonds secured only by the *incremental* tax revenues that are generated by increased assessed values on the property developed. Unlike general obligation bonds, TIF bonds are not secured by the full faith and credit of the governmental entity, but rather by the additional taxes to be assessed as a result of the project. In other words, the development will cause the municipality to receive an increase in tax revenues, and that increase can be pledged to the repayment of the bonds helping finance the development.

This reliance on the project's contribution to tax receipts makes the acquisition and/or infrastructure costs, in essence, self-financing. Because the amount of tax revenues generated prior to the TIF financing are still paid into the municipality's general fund, and only the additional tax revenues generated by the development secure the debt, a TIF financing does not affect the municipality's existing finances or municipal bond rating.

Cities and towns can use TIF financing to encourage and direct development in a particular area where growth is desired. The bonds usually qualify as tax-free municipal bonds, attracting private-sector developers eager to benefit from lower interest payments that are the hallmark of tax-exempt financing. Even when TIF bonds are not tax-exempt, they typically involve longer repayment terms, certain types of credit enhancement, and other advantages over capital market financing. These incentives enable desirable projects that would otherwise be too expensive and infeasible to go forward. In some cases, this funding also helps to address significant issues involving municipal services and other governmental matters such as environmental concerns.

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Unlike general obligation bonds, TIF bonds are not secured by the full faith and credit of the governmental entity, but rather by the additional taxes to be assessed as a result of the project.

Villages at Mount Hope Bay
Tiverton, Rhode Island

IMPLEMENTATION OF TIF

Although states' enabling statutes vary, the implementation of a TIF financing generally begins with public hearings and the creation of a TIF "district." The district may be limited to the location of the project itself or may include surrounding areas as well if they will share in the benefits of the development. Depending on the state, the standard that the local government must use to asses whether TIF can be used ranges from a determination that the project area is suffering from blight to simply that the proposed use is for the public welfare.

The revenue generated to fund payments under the TIF bonds is calculated by establishing a base year, which is generally the year the TIF is adopted. The assessed valuation of the property within the district is frozen at base year levels such that, during the existence of the TIF, the general taxing authorities have no claim to the increased assessed value over the base year amounts. Instead, the tax revenue allocable to any increase in the assessed value, or the incremental assessed value, is allocated to fund the payments to the bondholders. After the bonds are paid, the future tax revenues (including any future incremental tax revenues) go directly to the municipality.

Using Rhode Island as an example, the basic steps of the implementation of TIF are as follows:

- The municipality and/or private developers identify an area and a project as suitable for development.
- The municipality forms a redevelopment authority to oversee the project.
- A redevelopment plan is drafted.
- Public hearings are held and a TIF district is formed.
- An agreement is entered into between a redevelopment authority and a private developer.
- Eminent domain acquisition of the property and/or infrastructure costs are funded by TIF bonds (taxable or tax-exempt) issued by the redevelopment authority.
- The private developer may guarantee the bonds, or the municipality may apply its general obligation power as a "guaranty" to bondholders in case tax increment is not as high as expected.

TIFs EXPAND TO RESIDENTIAL PROJECTS

Historically, many TIF statutes were narrow in scope, often limiting applicability to a small group of projects where legislators believed economic assistance was needed. Residential projects may not have been included in the TIF statutory scheme -- either based upon concerns of affording preferences to certain populations or because of a belief that a residential project would not be a good engine for a municipality's economic growth. This belief was based on a traditional view of residential development, which held that demands on municipal services, such as schools and sewers, outweighed the benefits of the tax revenues derived from such projects.

However, the economic benefits of residential development have become more widely recognized, and in many jurisdictions today TIF may be used for residential as well as industrial or mixed-use projects.

TIF'S POTENTIAL BEING RECOGNIZED

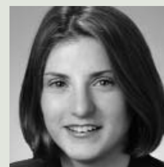
Recent projects in New England illustrate the growing appreciation for, and innovative uses of, TIF financing. The financing supports a partnership between a municipality and a private developer that creates an economic engine for a community, while at the same time addresses governmental problems such as infrastructure needs and environmental concerns.

(*TIF* continued on back cover)

UNEARTHING THE VALUE OF PETROLEUM CONTAMINATED PROPERTIES

MARK E. ELLIOTT

AMY E. GAYLORD



Despite their valuable corner locations and multiple driveways, former gas stations and other properties containing petroleum fuel underground storage tanks ("USTs") are frequently overlooked for development because of the environmental costs. However, purchasers in the market for developable properties should not automatically dismiss these properties, even if the sites are found to be contaminated. Purchasers should be aware that there is a financial program available in most states, known generically as an underground storage tank cleanup fund ("UST Fund"), which may offset cleanup costs and thereby make these properties more financially appealing than originally perceived. Because the UST Fund is not necessarily available to all property owners, it is necessary to include as part of a purchaser's due diligence both a search for USTs and an evaluation of the potential assignment of rights under a UST Fund.

WHAT IS A UST FUND?

Government-sponsored UST Funds are one of the primary financial programs available to assist property owners in cleaning up properties that are contaminated with petroleum fuels released from USTs. While most states have such programs, California's Barry Keene Underground Storage Tank Cleanup Fund of 1989 illustrates how the UST Fund generally works.

Funded by state taxes on fuel sales and overseen by state environmental agencies, the program primarily serves as a federally-mandated financial assurance mechanism ensuring the cleanup of fuel-contaminated properties and groundwater. An eligible party simply commences site cleanup, submits a claim to the UST Fund, and, upon acceptance of the claim, is reimbursed for

UST Funds generally reimburse eligible owners and operators of petroleum fuel USTs for the costs of corrective action and third party liability resulting from unauthorized fuel releases.

eligible costs. Because the average cost of a UST-release cleanup exceeds $500,000, and many UST programs provide $1 million or more to reimburse compensable corrective action costs, a UST Fund claim can be very valuable.

UST Funds generally reimburse eligible owners and operators of petroleum fuel USTs for the costs of corrective action and third party liability resulting from unauthorized fuel releases. Costs reimbursed by California's UST Fund include corrective action costs, third-party compensation costs, and regulatory or technical assistance costs. Corrective action costs must be reasonable, necessary, and acceptable to the appropriate regulatory agency. Such costs, by definition, include the cost of investigation and actual cleanup of contaminated soil and groundwater as well as numerous associated costs. Several items -- most notably, the costs of UST removal and repair -- are excluded from covered corrective action costs. Reimbursement of third party claims is limited to (i) actual costs and losses, such as medical expenses, lost wages, or lost business income caused by an unauthorized release, (ii) actual expenses for necessary remedial actions, and (iii) the fair market value of any property rendered permanently unsuitable for beneficial use by an unauthorized release.

Current and former owners and operators of petroleum USTs are generally eligible claimants under the UST Fund if they meet the following criteria: (i) the tank for which they seek reimbursement is properly permitted (if required); (ii) the corrective action taken by the claimant is consistent with state and federal law; (iii) the claimant is in compliance with state and federal UST financial responsibility requirements; (iv) the claimant has paid or will pay the corrective action costs claimed for reimbursement (because, in general, a UST Fund reimburses costs and does not front the cost of cleanup); and (v) in the event of third-party costs, the claimant is liable or has paid compensation to a third-party for damages represented by a final judgment, court approved settlement, or arbitration award.

In general, because they are not owners and operators of USTs, purchasers of property housing petroleum fuel USTs are not automatically eligible for UST Fund reimbursement (although some owners of property with abandoned USTs or residual UST-related contamination are often deemed "de facto" owners, and are therefore eligible claimants, despite the fact that they never owned the leaking UST). In addition, in some states, discovery of a leaking UST through a purchaser's due diligence efforts makes the purchaser ineligible for UST Fund reimbursement, although some states have relaxed this prohibition. For example, California recently modified its UST Fund regulations so that the State Water Resources Control Board, which oversees California's UST Fund, may reimburse the eligible costs claimed by a person who purchases or otherwise acquires real property on which an underground storage tank is situated if all of the following conditions apply: (i) the claimant is the owner or operator of the tank that had an occurrence that commenced prior to the owner's acquisition of the real property; (ii) the claimant satisfies all eligibility requirements; and (iii) the claimant is not an affiliate of any person whose act or omission caused or would cause ineligibility for the fund. In any event, for a purchaser to be eligible for UST Fund reimbursement, the eligible owner or operator of the UST must assign any existing UST Fund claim to the new property owner.

ASSIGNING A UST FUND CLAIM

Even when a purchaser is not directly eligible for reimbursement from the UST Fund, the purchase and sale transaction often can be structured in such a way as to assign the seller's reimbursement right to the purchaser. When a claim already exists, or when the purchaser is not otherwise entitled to state a claim in his or her own right (but the seller would be so entitled), the right to assert a claim must be assigned to the purchaser prior to, or concurrently with, the sale of the property.

In structuring a purchase agreement to include such an assignment, the following four factors should be considered: (i) the timing of the claim; (ii) how to preserve the claim; (iii) the form of the assignment of the claim from the eligible claimant to the purchaser; and (iv) the maintenance of the claim priority scheme. Each factor is discussed in more detail as follows:

Timing. As with all environmental problems, timing of the deal is always a concern. Analyzing whether there is a cognizable claim may require significant lead time prior to closing a deal. Rushing a sale before the viability of the claim has been confirmed only decreases the likelihood that a purchaser will be entitled to UST Fund reimbursement.

Preservation of the Claim. A deal must be structured to preserve the claim. If the right to make a claim against the UST program arises from the seller's status as the owner or operator of a UST at the time of release, the claim may be lost if it is not asserted prior to the sale of the property or preserved through assignment. Thus, it is imperative that the purchaser determines whether the seller is an eligible claimant with an existing assignable claim. If the purchaser is not an eligible claimant, the sale agreement should provide for the seller to submit a claim to the UST program prior to transferring the property, and should separately assign that claim, once made, to the purchaser. Most importantly, however, the seller's right to a claim must be preserved in the purchase and sale agreement. Most sellers request an "as-is" sale with a release and indemnity. By granting a release to the seller, often in exchange for a reduced sale price, the seller and purchaser may lose the right to make a claim. Therefore deals involving reduced price or escrowed funds to offset cleanup costs must be carefully scrutinized in relation to UST program regulations to ensure that potential claims are preserved.

Form of the Assignment. California officially recognizes a claimant's right to assign a UST Fund claim. A claim against the UST Fund must be assigned to the purchaser before or concurrently with the sale of the property in order to constitute a valid assignment. Assignments which frustrate the priority scheme of the claimants typically are not permitted. However, it appears that under certain circumstances discussed below, assignments which disregard the priority scheme of the claimants may be allowed. Because assignment agreements must track UST Fund requirements, purchasers and sellers should work closely with UST Fund regulators to ensure their agreement satisfies state-specific requirements.

Maintaining Claim Priority. Because California's UST program has insufficient money to pay all of the claims made against it, a priority system was established to favor those least able to pay the costs of cleanup, such as residential and small business tank owners. This scheme divides claims into four priority classes: Class A - claims by owners of residential USTs; Class B - claims by small businesses and some governmental units and non-profit organizations; Class C - claims by business and some governmental units and non-profit organizations with fewer than 500 employees; and Class D - all other claims. Higher priority claims are paid before lower priority claims. Historically, California has prohibited the assignment of claims where the assignment frustrates this priority scheme. For example, a low priority claimant typically is not allowed to expedite reimbursement by obtaining an assignment from a higher class claimant. However, California recently relaxed its prohibition on assignments which circumvent the priority scheme, and now allows such assignments on a case-by-case basis.

CONTAMINATED PROPERTY WORTH A SECOND LOOK

Developers of property should not hesitate to let the axiom of "location, location, location" drive their search for developable properties, even if such properties are former service stations. Given that under many circumstances a purchase and sale agreement can be structured to provide a purchaser with UST Fund reimbursement for liabilities associated with petroleum fuel releases from a UST, such properties are potentially viable, and valuable, investments.

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(*ULI Interview* continued from cover page)

was local. And then financing in the 80's became a national operation and people would come together at ULI to learn what was going on. Now, it's so amazing -- not only is it national, it's global. Capital markets are thought of globally and trends are thought of very much globally.

In listening to your vision of and strategic direction for ULI, I see parallels between ULI and Pillsbury Winthrop. PW's real estate practice section has global resources with a regional focus, and it appears that ULI's thinking is along those very same lines. Yes. As I like to say: "Think local … be global." So, from a best practices standpoint, I think we need to be global as so many extraordinary things are happening in places other than the United States. One of the most amazing experiences I've ever had was to go to Dubai this past Spring. I mean, Dubai has something like $75 billion of construction going on right now, which is probably about as much as the U.S. has in a year...in the whole country. And in one 50-acre spot, they're building sixty 30- to 40-story towers all at once. And mostly that's being done by members of ours who are either architects or engineers. But, from an individual member participation point of view, we are more local. That's why we have this rather extensive district council network.

> "We stay far away from politics and lobbying. That's not our angle. We gain influence through providing expert witnesses, participating in think tanks and providing potential resolutions -- not taking political positions."
>
> -- ***Rick Rosan,*** *ULI President*

How do you establish district councils and what role do they play in the ULI organizational structure? We have a rule: you have to have a certain number of members to have a legitimate district council. So, we go to areas where there are 50 to 100 members. Given that fact, it's not surprising that our largest district councils are in New York, San Francisco, Los Angeles, Chicago, Boston, and South Florida. Several of those have full-time executive directors. Los Angeles has a staff of 4 or 5 people running local events there. South Florida and Washington D.C. have very active district councils as well.

What about abroad? Actually, in Europe, we now have 11 district councils. We have a new ULI President of Europe who works with me.

So, many American professionals and U.S. members of ULI are involved in international development? Well, what we found is that our members, at various levels -- first the investment bankers and even some of the law firms -- have become international. If you go to CB Richard Ellis in Spain, you'll likely find Spanish CB Richard Ellis members, or in Germany, they'll be German. ULI tends to follow where our members have strength. For example, many of the service providers reside in the Far East -- in China, Korea, and Japan, among others.

In forming a district council in a given region, does ULI have standards or targets for the mix of professionals who make up a district council in order to create a balance of ideas from different sectors of the real estate industry? We always like the idea of having a cross-disciplinary mix. Interestingly enough, statistically, similar percentages of similar groups seem to end up making up a council. You end up with roughly 35% developers, 35% service providers, between 10-15% bankers, 10-15% lenders, and so on. And, there are consistently a great deal of academics and students involved. Now, in the United States we push the students and the academics a little harder, so there are naturally more of them. But it's interesting, if you look at a pie chart and you look at Europe versus the U.S., it's not so different. And, we're very young in Europe. We've only been really generating a lot of membership in the last four or five years.

In addition to providing a forum for dialogue and the sharing of ideas, how does ULI collect information to analyze and create approaches and methods that ULI endorses and recommends in development and otherwise? Well, we have a staff of 120 people, 35 to 40 of which are in the research and education program. We also have seven Fellows who are experts in this particular area. For example, we have Bill Hudnut who is the former Mayor of Indianapolis. We have a housing expert who previously worked at HUD and Fannie Mae. These are people late in their careers who have a great deal of experience and wisdom. In the Research and Education Department, we have different specialists -- housing, recreational development, commercial development, mixed-use, and transportation experts. These specialists collect and study the best practices. So, it's kind of a collective operation, and no one person really runs it.

Does ULI play any role in the political arena? We stay far away from politics and lobbying. That's not our angle. We gain influence through providing expert witnesses, participating in think tanks and providing potential resolutions -- not taking political positions. In my 12 years in Washington, not once have I testified on Capitol Hill. I have never lobbied for one thing. We conduct research and advocate, but lobbying is another story.

In a recent President's Message you stated that it is no longer a matter of "build it and they will come," now it is we "build where they are." Can you elaborate on that statement? The message is that quality of life and environment are really what draw people. For example, a young person is not going to head to an undesirable location just to work for a certain company. Rather, that person will simply work for the same company in a more desirable environment. The bottom line these days is that cities and places that are not thinking about being attractive and environmentally sensitive are not going to attract young people.

Is it your sense then that the desire to be in urban areas such as Los Angeles, coupled with the general distaste of Los Angelenos for mass transportation, create a further need to build "where they are"? Absolutely. And there are a host of demographic issues in this country and elsewhere that also create a further need. People are getting married later, or often not at all. Ultimately, we're seeing a greater number of single people who want to interact with other people, and a huge revival for cities in that respect. But, at the same time, there has been such a massive population growth in the United States that enormous amounts of development continue to go on at the fringes. Unfortunately, I think some of the development is pretty awful, and we really need to get our arms around it. It is imperative that we address this issue as there are certainly better ways of doing things than they have been done of late. We think that 90% of the development that's going to occur in the next 15 or 20 years is going to be on the fringes -- in the green fields. And, naturally, that's true of California, where you have such overwhelming population growth.

What role would ULI play with respect to mass transportation planning? We are constantly advocating best practices in mass transit through various

channels such as symposiums, seminars and conferences. We've written interesting books on mixed-use development. We are using every medium that we can think of to get people to think about the best way to solve various urban problems. ULI's approach is two-pronged. On the one hand, our function is to congregate people -- to gather professionals to exchange and expand their ideas. On the other hand, we strive to provide guidance with respect to best practices in real estate. That's not to say that there's only one way to do things. In fact, we know there are many ways to get things done and there are unique regional issues everywhere. But, bringing people together, providing guidance, and exploring these concepts as a group is a very powerful tool.

As a long time New Yorker, have you been satisfied with the role ULI has played in the resuscitation of the Manhattan marketplace following the debilitating events of 9/11? Interestingly enough, we weren't as active immediately after 9/11 because it was premature for us. The kind of thing that ULI does is better done now when they have some plans that they're thinking about, and they have developed some form of an approach. We've been asked by the Port Authority of New York and New Jersey and the Lower Manhattan Development Corporation to look at retail issues in connection with the rebuilding of the Trade Center and we have about 10 experts from around the world -- one from the Netherlands, one from London, one from Japan, and the rest are from the United States. With experts coming from so many different backgrounds and so many unique experiences, our advisory panel program is a pretty powerful tool.

What role will ULI play in connection with the tremendous damage caused by the hurricanes in Florida? I think that we'd be of limited use right now. Right now, the focus should be on damage control. We would be best able to help in six months to a year, when regions begin to encounter development and planning issues. For now, the focus should be on providing water and electricity to people who are currently without.

What do you feel are the most important things that ULI has to offer to the community and to the real estate industry? We can assemble many disciplines to work together to analyze problems and propose alternative solutions. I think our real strength is in the fact that we have architects, planners, developers, lawyers and people who have expertise in all aspects of real estate cooperating to find solutions otherwise unattainable.

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(*TIF* continued from page 7)

In New Milford, Connecticut, Vespera New Milford LLC, one of Karl Frey's newest ventures represented by Pillsbury Winthrop, is in the early stages of developing a 508-unit active adult community to be known as Dunham Farms. The project is beneficial to the town for many reasons, including increasing in the town's tax base and generating additional revenues for local merchants, all without the pressure on the school system that another type of residential project might add. Environmental and "smart growth" concerns, such as preserving open space and creating a land trust, are part of both the municipality's and the developer's agenda.

Karl Frey is enthusiastic about the use of TIF or TIF-like structures for his projects in Connecticut and their ability to assist a community with conservation efforts by encouraging beneficial developments. "The conservation effect for the state of Connecticut will be thousands of acres of farms, scenic vistas, sensitive environmental areas and woodlands put into permanent conservation," he said.

As in Tiverton, significant funding for infrastructure is necessary to allow the New Milford project to go forward. Funding for this project is likely to be complex, because Connecticut's TIF enabling statute authorizes its use in commercial projects but does not provide for residential TIFs. However, New Milford may authorize a special taxing district to set up a TIF-like structure to accomplish its goals of controlled development.

Keenan Rice, the president of MuniCap, a public finance consulting firm that has assisted with both the Rhode Island and Connecticut projects, stated, "In the Northeast, municipalities and developers are beginning to see the potential of tax increment financing as a tool to encourage economic development and to finance public improvement. In Connecticut, the enabling statutes are currently more limited in scope and do not permit the full potential of tax increment financing to be realized. The success of recent projects in New England, including in Connecticut, will hopefully prompt an interest in states in the region to adopt and utilize broader TIF legislation."

TIF GROWING IN POPULARITY

The use of TIF in some regions has been limited to date due to the popularity and availability of general obligation financing, restrictions on TIF's use in residential development, and other factors. However, budgetary restrictions that tighten the supply of funds for municipal projects and make the issuance of general obligation bonds more difficult -- together with the demonstrated success of TIF in other local projects -- are factors that are likely to expand the popularity and scope of TIF in coming years. As public attention to environmental and smart growth concerns increases and spreads to all areas of the country, so too will the application of TIF as a means to address these issues.

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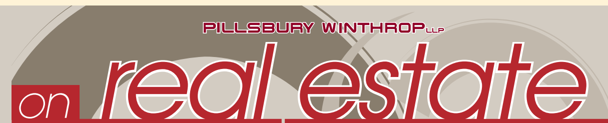

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