



"With the closure of 22 major military bases across the country between 2005 and 2011 and new closures on the horizon, more and more lenders, insurers and real estate developers will be involved in military base redevelopment. "

Protecting Developers from Contamination on Former Defense Sites

Client: Richmond American Homes of Colorado Inc., Standard Pacific of Colorado Inc., Metropolitan Development IV LLC and Metropolitan Builders, Touchstone Homes LLC

When the U.S. Air Force closed the Lowry Air Force Base in Denver, the site became an attractive opportunity for redevelopment. Richmond, Standard Pacific, Metropolitan, and Touchstone (the "Homebuilders") purchased finished lots in an area of Lowry called the Northwest Neighborhood for the purpose of building single-family residential homes.

After the Homebuilders began construction, the Colorado Department of Public Health and Environment (CDPHE) discovered asbestos in the soil in the Northwest Neighborhood that represented subsurface contamination originating with the historic military activity at Lowry. CDPHE issued compliance advisories (the "Advisories"), directing the Homebuilders to cease all construction activities in the Northwest Neighborhood and ordering them to investigate and remediate the asbestos contamination. The Air Force refused to respond to the Advisories on behalf of the Homebuilders, despite clear statutory and contractual obligations to do so. The Homebuilders therefore undertook the investigation and remediation activities required by the Advisories at their own expense. Investigation and remediation ultimately cost the Homebuilders approximately \$9 million in out-of-pocket costs and related damages.

Partnering with Brownstein Hyatt Farber Schreck's Natural Resources and Litigation groups, the Homebuilders brought a lawsuit against the Air Force asserting claims for indemnification and cost recovery under Section 330 of the National Defense Authorization Act and breach of deed covenants. Following a two-year legal battle, the U.S. Court of Federal Claims found that the Air Force caused the asbestos contamination [during serial demolitions of asbestos-contaminated buildings during the Air Force's operation of the active military enclave and before the transfer to private sector control]. Additionally, the court found that the broad indemnity language of Section 330 required the Air Force to compensate the Homebuilders for costs arising out of that contamination and the related issuance of the Advisories. By securing this decision, Brownstein achieved the first published federal court precedent that protects developers from the often exorbitant cleanup costs for environmental contamination caused by the Armed Services' management of formerly used defense sites.

This published opinion of the Court of Federal Claims is also the first and only decision by any federal court that interprets the United States' indemnification obligations respecting undisclosed contamination conditions under Section 330 of the National Defense Authorization Act.

Meet The Team

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