First American Title Company

Escrow No.: NCS-207205-7

DOCUMENT: 19529953

Pages: 11

Fees.... 37.00
Taxes...
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AMT PAID 37.00

REGINA ALCOMENDRAS
SANTA CLARA COUNTY RECORDER
Recorded at the request of
Recording Service

RDE # 014
7/30/2007
1:45 PM

Recording Requested By:
Cousins San Jose MarketCenter, L.L.C
c/o Cousins Properties, Incorporated
Attention: Corporate Secretary
191 Peachtree Street
Atlanta, Georgia 30303-1740

When Recorded, Mail To:
Bruce Wolfe, Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, California 94612

CALIFORNIA REGIONAL WATER
AUG 27 2007
QUALITY CONTROL BOARD

COVENANT AND ENVIRONMENTAL RESTRICTION ON PROPERTY

San Jose MarketCenter
San Jose, California 95110
Parcel Numbers 259-54-027 through 259-54-048

This Covenant and Environmental Restriction on Property (this "Covenant") is made as of the 20th day of July, 2007 by Cousins San Jose MarketCenter, L.L.C, 2500 Windy Ridge Parkway, Suite 1600, Atlanta, Georgia 30339 ("Covenantor") who is the Owner of record of that certain property[1] situated at Parcel Numbers 259-54-027 through 259-54-048, in the City of San Jose, County of Santa Clara, State of California, which is more particularly described in Exhibit A attached hereto and incorporated herein by this reference (such portion hereinafter referred to as the "Burdened Property"), for the benefit of the California Regional Water Quality Control Board for the San Francisco Bay Region (the "Board"), with reference to the following facts:

A. The Burdened Property contains chemically-impacted soils. The Burdened Property was mitigated in accordance with a Risk Management Plan (RMP) dated October 2004 that was approved by the Board.

[1]503 Coleman Avenue (Lot 23, Pad 1) Suites 10, 20, 30, and 40; 511 Coleman Avenue (Lot 22, Pad 2); 519 Coleman Avenue (Lot 21, Shop 2) Suites 10, 20, 30, 40, and 50; 533 Coleman Avenue (Lot 1, Major 1 – Target); 535 Coleman Avenue (Lot 2, Major 2); 543 Coleman Avenue (Lot 20, Shop 3); 555 Coleman Avenue (Lot 3, Major 3 – Cost Plus); 561 Coleman Avenue (Lot 4, Major 4 – Michael's); 567 Coleman Avenue (Lot 19, Shop 4) Suites 10, 20, 30, 40, and 50; 579 Coleman Avenue (Lot 5, Shop 1) Suites 10, 20, 30, 40, 50, 60, 70, 80, 90, 100, 110; 595 Coleman Avenue (Lot 18, Shop 5) Suites 10, 20, 30, and 40; 607 Coleman Avenue (Lot 6, Major 5); 615 Coleman Avenue (Lot 7, Major 6 – Office Depot); 625 Coleman Avenue (Lot 16, Pad 3); 635 Coleman Avenue (Lot 9, Pad 4); 655 Coleman Avenue (Lot 11, Pad 6); 665 Coleman Avenue (Lot 12, Pad 7); 675 Coleman Avenue (Lot 13, Pad 8); 685 Coleman Avenue (Lot 15, Pad 9); 695 Coleman Avenue (Lot 14, Pad 10) Suites 10, 20, 30, and 40.

B. Contamination of the Burdened Property. Soil at the Burdened Property was contaminated from railyard operations conducted by Southern Pacific Rail Road (later Union Pacific Railroad) from the late 1890s to the early 1990s. These operations resulted in the release of chemicals, to soil, including primarily lead, arsenic, petroleum hydrocarbons, and polynuclear aromatic hydrocarbons, which constitute hazardous materials as that term is defined in Health & Safety Code Section 25260. Remediation of the Burdened Property consisted of treatment and capping of soils and removal of an underground storage tank in accordance with the approved RMP.

Groundwater at the Burdened Property is impacted with low concentrations of TPH migrating from an upgradient, adjacent offsite property. First encountered groundwater at the site was approximately 18 feet below the ground surface. The Responsible Party, UPRR, continues to monitor groundwater quality in accordance with a monitoring program approved by the Board.

C. Exposure Pathways. The contaminants addressed in this Covenant are present on the Burdened Property as described in Section B. Engineering controls and mitigation measures implemented at the Burdened Property have eliminated these exposure pathways. However, without proper implementation of the RMP and operation and maintenance at the site persons could be exposed to these contaminants.

D. Adjacent Land Uses and Population Potentially Affected. The Burdened Property has been developed for commercial/retail use, and is adjacent to industrial land uses to the south, east and west, and is adjacent to commercial and residential land use to the north.

E. Full and voluntary disclosure to the Board of the presence of hazardous materials on the Burdened Property has been made and extensive sampling of the Burdened Property has been conducted.

F. Covenantor desires and intends that in order to benefit the Board, and to protect the present and future public health and safety, the Burdened Property shall be used in such a manner as to avoid potential harm to persons or property that may result from hazardous materials that may have been deposited on portions of the Burdened Property.

ARTICLE I
GENERAL PROVISIONS

1.1 Provisions to Run with the Land. This Covenant sets forth protective provisions, covenants, conditions and restrictions (collectively referred to as "Restrictions") upon and subject to which the Burdened Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. The restrictions set forth in Article III are reasonably necessary to protect present and future human health and safety or the environment as a result of the presence on the land of hazardous materials. Each and all of the Restrictions shall run with the land, and pass with each and every portion of the Burdened Property, and shall apply to, inure to the benefit of, and bind the respective successors in interest thereof, for the benefit of the Board and all Owners and Occupants. Each and all of the Restrictions are imposed upon the entire Burdened Property unless expressly stated as applicable to a specific portion of the Burdened Property. Each and all of the Restrictions run with the land pursuant to section 1471 of the Civil Code. Each and all of the Restrictions are enforceable by the Board.

1.2 Concurrence of Owners and Lessees Presumed. All purchasers, lessees, or possessors of any portion of the Burdened Property shall be deemed by their purchase, leasing, or possession of such Burdened Property, to be in accord with the foregoing and to agree for and among themselves, their heirs, successors, and assignees, and the agents, employees, and lessees of such owners, heirs, successors, and assignees, that the Restrictions as herein established must be adhered to for the benefit of the Board and the Owners and Occupants of the Burdened Property and that the interest of the Owners and Occupants of the Burdened Property shall be subject to the Restrictions contained herein.

1.3 Incorporation into Deeds and Leases. Covenantor desires and covenants that the Restrictions set out herein shall be incorporated in and attached to each and all deeds and leases of any portion of the Burdened Property. Recordation of this Covenant shall be deemed binding on all successors, assigns, and lessees, regardless of whether a copy of this Covenant and Agreement has been attached to or incorporated into any given deed or lease.

1.4 Purpose. It is the purpose of this instrument to convey to the Board real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to residual hazardous materials.

ARTICLE II
DEFINITIONS

2.1 Board. "Board" shall mean the California Regional Water Quality Control Board for the San Francisco Bay Region and shall include its successor agencies, if any.

2.2 Improvements. "Improvements" shall mean all buildings, roads, driveways, regradings, and paved parking areas, constructed or placed upon any portion of the Burdened Property.

2.3 Occupants. "Occupants" shall mean Owners and those persons entitled by ownership, leasehold, or other legal relationship to the exclusive right to use and/or occupy all or any portion of the Burdened Property.

2.4 Owner or Owners. "Owner" or "Owners" shall mean the Covenantor and/or its successors in interest, who hold title to all or any portion of the Burdened Property.

ARTICLE III
DEVELOPMENT, USE AND CONVEYANCE OF THE BURDENED PROPERTY

3.1 Restrictions on Development and Use. Covenantor promises to restrict the use of the Burdened Property as follows:

a. Residential development for human habitation shall not be permitted on the Property, except for the development of townhouses and multifamily residences, and hotels. Any townhouse or multifamily residence developments shall be constructed so that areas for human habitation are located at least one floor above the ground floor of the building in which they are located and such developments shall not have ground level outdoor play areas except for areas covered with asphalt, concrete or other surfacing that prevents contact with soils containing the hazardous substances identified in Paragraphs 1.02 and 1.03;

b. No hospitals shall be permitted on the Burdened Property;

c. No schools for persons under 21 years of age shall be permitted on the Burdened Property. For the purposes of this article, a "school" means a freestanding facility with an open air playground and does not mean any day-care center, tutoring center, recreational facility designed for children or teenagers or business providing instruction for children in the arts (including dance) or athletics;

d. No day care centers for children or day care centers for Senior Citizens shall be permitted on the Burdened Property;

e. No Owners or Occupants of the Property or any portion thereof shall conduct any excavation work on impacted soil on the Property, except as specified in the Risk Management Plan or Operation, Maintenance and Monitoring Plan approved by the Board. Any contaminated soils brought to the surface by grading, excavation, trenching, or backfilling shall be managed by Covenantor or his agent in accordance with all applicable provisions of local, state and federal law; provided, however, that for any portion of the Property, the obligations of the Covenantor and its agents under this subarticle for that portion of the Property terminate when and if Covenantor conveys that portion of the Property to an unrelated party;

f. All uses and development of the Burdened Property shall be consistent with the Risk Management Plan, which is hereby incorporated by reference including future amendments thereto. All uses and development shall preserve the integrity of any cap, any remedial measures taken or remedial equipment installed, and any groundwater monitoring system installed on the Burdened Property pursuant to the requirements of the Board, unless otherwise expressly permitted in writing by the Board;

g. No Owners or Occupants of the Property or any portion thereof shall drill, bore, otherwise construct, or use a well for the purpose of extracting water for any use, including but not limited to, domestic, potable, or industrial uses, unless expressly permitted in writing by the Board;

h. The Owner shall notify the Board of each of the following: (1) The type, cause, location and date of any disturbance to any cap, any remedial measures taken or remedial equipment installed, and of the groundwater monitoring system installed on the Burdened Property pursuant to the requirements of the Board, which could affect the ability of such cap or remedial measures, remedial equipment, or monitoring system to perform their respective functions and (2) the type and date of repair of such disturbance. Notification to the Board shall be made by registered mail within ten (10) working days of both the discovery of such disturbance and the completion of repairs;

i. The Covenantor agrees that the Board, and/or any persons acting pursuant to Board orders, shall have reasonable access to the Burdened Property for the purposes of inspection, surveillance, maintenance, or monitoring, as provided for in Division 7 of the Water Code;

j. No Owner or Occupant of the Burdened Property shall act in any manner that will aggravate or contribute to the existing environmental conditions of the Burdened Property. All use and development of the Burdened Property shall preserve the integrity of any capped areas;

3.2 Enforcement. Failure of an Owner or Occupant to comply with any of the restrictions, as set forth in paragraph 3.1, shall be grounds for the Board, by reason of this Covenant, to have the authority to require that the Owner modify or remove any Improvements constructed in violation of that paragraph. Violation of the Covenant shall be grounds for the Board to file civil actions against the Owner as provided by law.

3.3 Notice in Agreements. With regard to all purchase agreements and leases entered into after the date of recordation hereof, all Owners and Occupants shall execute a written instrument which shall accompany all purchase agreements or leases relating to the property Any such instrument shall contain the following statement:

> The land described herein contains hazardous materials in soils and in the ground water under the property, and is subject to a deed restriction dated as of _____, 2007, and recorded on _____, 2007, in the Official Records of Santa Clara County, California, as Document No. _____, which Covenant and Restriction imposes certain covenants, conditions, and restrictions on usage of the property described herein. This statement is not a declaration that a hazard exists.

ARTICLE IV
VARIANCE AND TERMINATION

4.1 Variance. Any Owner or, with the Owner's consent, any Occupant of the Burdened Property or any portion thereof may apply to the Board for a written variance from the provisions of this Covenant.

4.2 Termination. Any Owner or, with the Owner's consent, any Occupant of the Burdened Property or a portion thereof may apply to the Board for a termination of the Restrictions as they apply to all or any portion of the Burdened Property.

4.3 Term. Unless terminated in accordance with paragraph 4.2 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

ARTICLE V
MISCELLANEOUS

5.1 No Dedication Intended. Nothing set forth herein shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Burdened Property or any portion thereof to the general public.

5.2 Notices. Whenever any person gives or serves any notice, demand, or other communication with respect to this Covenant, each such notice, demand, or other communication shall be in writing and shall be deemed effective (1) when delivered, if personally delivered to the person being served or official of a government agency being served, or (2) three (3) business days after deposit in the mail if mailed by United States mail, postage paid certified, return receipt requested:

Regional Water Quality Control Board
San Francisco Bay Region
Attention: Executive Officer
1515 Clay Street, Suite 1400
Oakland, California 94612

5.3 Partial Invalidity. If any portion of the Restrictions or terms set forth herein is determined to be invalid for any reason, the remaining portion shall remain in full force and effect as if such portion had not been included herein.

5.4 Article Headings. Headings at the beginning of each numbered article of this Covenant are solely for the convenience of the parties and are not a part of the Covenant.

5.5 Recordation. This instrument shall be executed by the Covenantor and by the Executive Officer of the Board. This instrument shall be recorded by the Covenantor in the County of Santa Clara within ten (10) days of the date of execution.

5.6 References. All references to Code sections include successor provisions.

5.7 Construction. Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the Covenant to effect the purpose of this instrument and the policy and purpose of the Water Code. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

IN WITNESS WHEREOF, the parties execute this Covenant as of the date set forth above.

Covenantor: Cousins San Jose Market Center, LLC
By: Cousins Properties Incorporated

By: _____ PSC

Title: Steve V. Yenser, Senior Vice President

Date: _____

Agency: State of California
Regional Water Quality Board,
San Francisco Bay Region

By: _____

Title: Executive Officer

Date: July 20, 2007

STATE OF ~~CALIFORNIA~~ Georgia)
)
COUNTY OF ~~ALAMEDA~~ Fulton)

On 26th JULY, 2007 before me, the undersigned a Notary Public in and for said state, personally appeared [Covenantor], personally known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument.

WITNESS my hand and official seal.

_____
Notary Public in and for said
County and State

ELEANOR M. BINFORD
NOTARY
EXPIRES
GEORGIA
NOV. 07, 2008
PUBLIC
FULTON COUNTY

STATE OF CALIFORNIA)
)
COUNTY OF ALAMEDA)

On 20th JULY, 2007 before me, the undersigned a Notary Public in and for said state, personally appeared [EXECUTIVE OFFICER], personally known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument.

WITNESS my hand and official seal.

_____ 07/20/2007
Notary Public in and for said
County and State

(A) Please see attached Notary Certificate for proper Notary wording & seal.

ALAMEDA COUNTY
My Commission Expires
April 2, 2010

California All Purpose Acknowledgement

State of California)
) ss.
County of ALAMEDA)

On 20th JULY, 2007 before me, SUNIL JASWAL (Notary Public).
(Date) Name and Title of Officer

Personally appeared BRUCE HATCH WOLFE (~~Executive Officer~~)

☐ Personally known to me
☒ Proved to me on basis of satisfactory evidence

to be the person(s) whose name(s) is/are subscribed to within instrument and acknowledgement to me that he/she /they executed the same in his/her/their authorized capacity (ies), and by his/her/their signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

SUNIL JASWAL
COMM. # 1656166
NOTARY PUBLIC•CALIFORNIA
ALAMEDA COUNTY
My Commission Expires
April 2, 2010

My Commission Expires on April 02, 2010.

WITNESS my hand and official seal

Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document

Description of Attached Document

Title or Type of Document Covenant & Environmental Restriction on Property

Document Date 07/20/2007 Number of Pages 8

Signer(s) if Other than Named above As above

Capacity (ies) Claimed by Signer

Signer's Name As above

- o Individual
- o Corporate Officer_ Title(s)_____
- o Partner—Limited / General
- o Attorney-in-fact
- o Trustee
- o Guardian or Conservator
- ☒ Other Executive Officer

Right Thumbprint of Signer
Top of thumb here

SUNIL JASWAL
COMM. # 1656166

Exhibit A

All that certain real property situate in the City of San Jose, County of Santa Clara, State of California, being more particularly described as follows:

PARCEL ONE:

All of Lots 2, 3, 4, 5, 6, 14, 15, 17, 18, 19, 20, 21, 22 and 23, as said Lots are shown on that certain map entitled "FINAL MAP TRACT 9707, SAN JOSE MARKETCENTER-UNIT 2", filed on June 23, 2005 in Book 788 of Maps at Pages 6 to 8 inclusive, Santa Clara County Records.

APN's: 259-54-027, 028, 029, 030, 031, 039, 040, 042, 043, 044, 045, 046, 047 and 048

PARCEL TWO:

Parcel B, as said parcel is shown on that certain Lot Line Adjustment recorded November 17, 2006 as Document No. 19192225 of Official Records.

APN: 259-54-032

PARCEL THREE:

Parcel A, as said parcel is shown on that certain Lot Line Adjustment recorded November 17, 2006 as Document No. 19192225 of Official Records.

APN: 259-54-033

PARCEL FOUR:

Parcel A, as said parcel is shown on that certain Lot Line Adjustment recorded November 01, 2006 as Document No. 19165596 of Official Records.

APN: 259-54-034 and 035

PARCEL FIVE:

Parcel A, as said parcel is shown on that certain Lot Line Adjustment recorded May 02, 2007 as Document No. 19408934 of Official Records.

APN: 259-54-036

PARCEL SIX:

Parcel B, as said parcel is shown on that certain Lot Line Adjustment recorded May 02, 2007 as Document No. 19408934 of Official Records.

APN: 259-54-037

PARCEL SEVEN:

Parcel C, as said parcel is shown on that certain Lot Line Adjustment recorded May 02, 2007 as Document No. 19408934 of Official Records.

APN: 259-54-038

PARCEL EIGHT:

Parcel B, as said parcel is shown on that certain Lot Line Adjustment recorded November 01, 2006 as Document No. 19165596 of Official Records.

APN: 259-54-041