

# RE

# SOURCE™

A GOODWIN PROCTER PUBLICATION FOR THE REAL ESTATE INDUSTRY



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■ **REITs Post-Meltdown:**  
Can Success Expand to  
New Market Entrants?

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Is It Worth the Cost?

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Help for the Land-Secured  
Market?

**Editor-in-Chief**

Robert M. Haight, Jr.

**Editors**

Lewis G. Feldman  
John M. Ferguson  
Edward C. Hagerott  
John T. Haggerty  
Douglas A. Praw  
Christopher B. Price  
Andrew C. Sucoff

**Production**

Sarah E. Moore  
Bridget C. Huffstutler  
Nathan G. Leonard  
Matthew Fetter

**Design**

The Castle Press

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It is commonly understood that investors loathe uncertainty. The last two years have heaped an extra large helping of uncertainty on the real estate industry. With some economic signs pointing upward and the turbulent market starting to calm, real estate participants seek understanding through a myriad of questions.

The articles found in this edition of REsource explore several of these questions:

- Will REITs' prior successes carry over to new market entrants?
- Are "Green" certifications worth the cost?
- Can Qualified School Construction Bonds help address school construction financing challenges?
- Do Build America Bonds have a future in the land-secured municipal debt market?

These questions are intended to identify trends and opportunities, but the current market does not yield easy answers. Like many things in life, the answers depend on circumstances. With the novelty of many real estate products and situations, and a rapidly evolving market, the only thing that can be said is:

## Stay Tuned!

While it doesn't appear that the real estate market is going to bring certainty at this time, and real estate participants may have to live with the discomfort uncertainty brings for a while longer, perhaps participants can take some comfort in the words of J. Paul Getty — no stranger to the vicissitudes of the market — when he said:

"Without the element of uncertainty, the bringing off of even the greatest business triumph would be dull, routine, and eminently unsatisfying."

— Robert M. Haight, Jr.  
Editor-in-Chief



# REITs POST-MELTDOWN: Can the Virtuous Circle Expand to New Market Entrants?



by Ettore A. Santucci and Lee G. Giguere

In the real estate downturn of the early 1990s, many real estate owners escaped excessive debt burdens and positioned themselves for better times by using the REIT vehicle to access public capital markets. Since that time, REITs have proven their viability in boom times and in downturns. Publicly traded REITs weathered the recent economic crisis better than other real estate industry participants, and probably better than corporate America as a whole, by protecting their most valuable asset—access to the equity and debt capital markets. Many are looking to the REIT vehicle to lead the way out of the current downturn, just as it did in the early 1990s. To date, however, the results have been mixed and new REITs looking to capitalize on the market credibility built up by existing REITs have struggled for traction amid economic uncertainty.

## Disciplined Response to Crisis

The 2007/2008 financial markets dislocation dealt shocking blows to the REIT industry. In late 2008, REIT stocks tumbled as REITs faced a grim economic outlook

with rising unemployment and frozen capital markets. Over-leveraged balance sheets reflected large amounts of debt nearing maturity. REITs quickly responded by instituting cash preservation strategies, including cutting dividends and paying dividends partially in stock.

The following year brought a massive re-equitization effort as REITs deleveraged to adjust to new economic realities. Secondary common equity offerings by REITs raised more than \$21.2 billion during 2009 compared to \$11.1 billion during 2008, an increase of over 90%. Although highly dilutive to existing shareholders, these offerings solved the problem of unsustainable leverage.

When debt markets thawed during the second half of 2009, REITs issued unsecured bonds to refinance debt with near term maturities without materially increasing their interest expense. During 2009, REITs raised more than \$10.4 billion through issuances of unsecured bonds compared to \$5.2 billion for 2008. Of the bonds issued in 2009, approximately 75% were issued during the second half of the year.

***“Publicly traded REITs weathered the recent economic crisis better than other real estate industry participants....”***



The key to the public REITs' success in weathering the economic turmoil was access to the capital markets and a store of credibility with investors that had been built up over time through disciplined capital strategies. The rest of the real estate industry took notice and many turned to forming new REITs as the way out of the crisis.

## Blind Pools Access the Public Markets

**Blind-Pool Mortgage REITs:** In mid-2009, a number of newly formed "blind-pool" mortgage REITs, which invest in commercial and residential loans and mortgage-backed securities, attempted to access the capital markets through initial public offerings. Their sponsors anticipated outsized rates of return from exploiting the unprecedented dislocation

The public capital markets were a lifeline for many REITs. Through cash preservation strategies and public offerings, REITs addressed their capital structure issues and achieved sustainable leverage levels while avoiding the threat from near-term debt maturities. In a classic example of a virtuous circle:

- despite highly dilutive offerings, REIT stock prices held or even increased once debt levels decreased;
- by refinancing debt at reasonable rates with longer maturities, REITs proved that creditors had confidence in their balance sheets, which stabilized trading values for REIT bonds; and
- despite accumulating cash as "dry powder" and carrying it at a negative spread, many REIT stock prices did not suffer.

in the credit markets and filling the vacuum created by the retreat of traditional financing sources. Those that came to market early, and, in particular, those with well-known sponsors, such as Starwood Property, had better success than those that followed. Many mortgage REIT IPOs were abandoned when fewer opportunities to buy distressed assets at cheap prices materialized.

***“...REITs have evolved into an essential part of the capital markets landscape and provide real estate entrepreneurs with an established path to market credibility and public capital.”***

**Blind-Pool Equity REITs:** A second IPO wave from mid-2009 through the first half of 2010 consisted of blind-pool equity REITs, which focus on operating properties. A number of these, such as Terreno Realty, successfully completed their IPOs and have acquired assets, but progress is slow due to continued market turbulence. Similar to mortgage REITs, buying opportunities were less than anticipated. Once transaction volume for distressed or undercapitalized properties increases and valuations stabilize, blind-pool equity REITs will be able to deploy their capital at attractive rates of return and their stock prices will rise. These REITs will face significant competition for available assets from existing public REITs that have built up their war chests.

### **Identified Asset REITs Undertake IPOs**

Starting in the fourth quarter of 2009 and through the first half of 2010, IPO activity by REITs with identified assets surged in multiple sectors, including office, hospitality, storage facilities, and data centers. Piedmont Office Realty (office), Hudson Pacific Properties (office), and Excel Trust (retail) were successfully priced. A number of other REIT IPOs, however, struggled with pricing or remain stalled in the pipeline. Transactions must contend with investors' "disciplined" valuation models, which adversely impact pre-IPO equity value, and aggressive NOI growth expectations, principally from increases in occupancy and positive mark-to-market of expiring leases. These twin pressures significantly impact FFO multiples, making pricing difficult and, sometimes, leading to disappointing post-IPO trading. Many IPOs must balance dividend yield expectations with short-term NOI growth, which can lead to unsustainably high payout ratios. Coming into the summer, market fundamentals continued to fuel investors' fears that REIT IPOs would fail to deliver expected returns. This compounded the difficulty of building a solid book of

dedicated REIT investors. Uncertainty and turbulence in the equity markets persist and, as a result, the IPO backlog is in the low-teens.

It may only take signs of life in some key variables to create the conditions necessary for the successful completion of a number of REIT IPOs in the pipeline. Improvements in occupancy outlook would be a powerful catalyst, as would a market consensus that FFO multiples and capitalization rates have stabilized. However, predicting what level of movement in key variables would be sufficient to trigger a resurgence of REIT IPO activity is difficult. For now, the best one can do is monitor the fundamentals of real estate valuations, the operating results and leverage of existing REITs, and the volume of transactions (both real estate and capital markets) for positive trends.

Market conditions are making the ride for REIT IPO candidates a harrowing one. Over the last 20 years, however, REITs have evolved into an essential part of the capital markets landscape and provide real estate entrepreneurs with an established path to market credibility and public capital. With a good dose of perseverance and a little help from the broad economy, many new entrants will be successful. Moreover, the same market-enforced discipline that has made REITs successful over the past several cycles will serve new entrants well. ■

**Ettore A. Santucci** is a partner in the Boston office of Goodwin Procter and can be reached at (617) 570-1531 or [esantucci@goodwinprocter.com](mailto:esantucci@goodwinprocter.com).

**Lee G. Giguere** is an associate in the Boston office of Goodwin Procter and can be reached at (617) 570-1156 or [lgiguere@goodwinprocter.com](mailto:lgiguere@goodwinprocter.com).

# Green Certification:

by Gina M. Schilmoeller

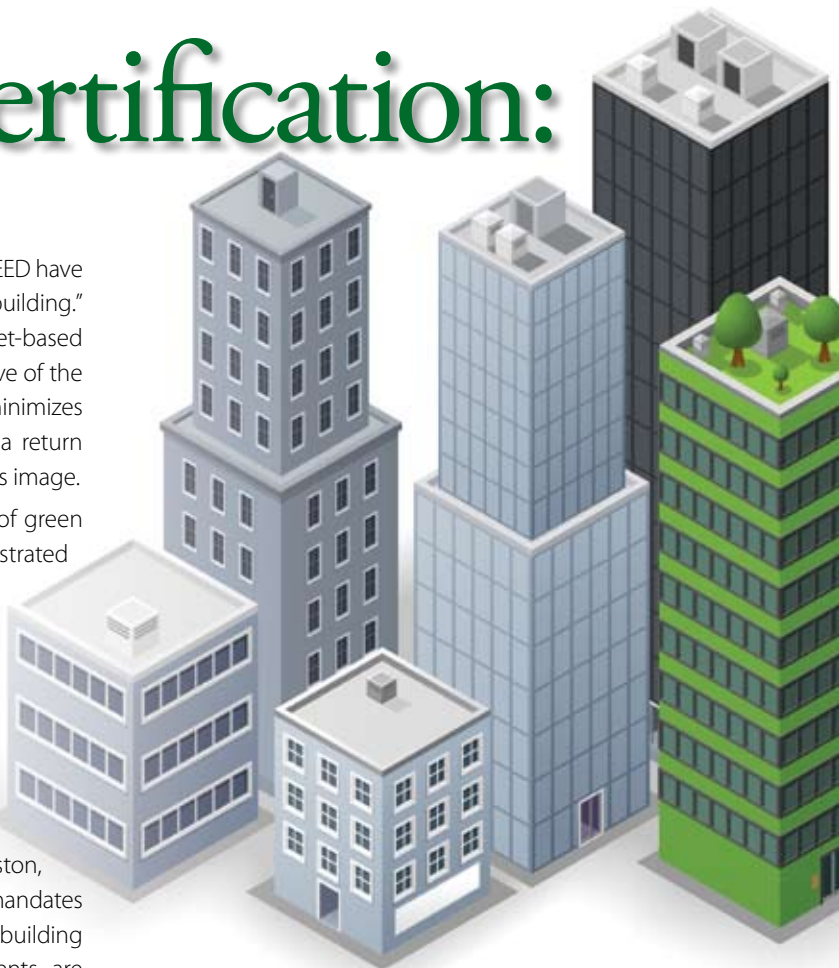
In the United States, the terms Energy Star and LEED have quickly become synonymous with “green building.” Today’s mainstream recognition of these market-based systems for voluntary green certification is indicative of the market demand for commercial real estate which minimizes immediate operational expenses and maximizes a return on investment while portraying a socially conscious image.

Over the past 10 years, the escalating number of green buildings absorbed into the national market has illustrated the nation’s demand. According to RREEF Research, in 2008, 25 times more green office space was constructed in the United States than in 2000. By 2009, this figure had increased to 50 times that of 2000. Despite that overall office construction fell flat in the Great Recession, green office construction continued to rise. In addition, a large and growing number of cities and states—such as Washington D.C., Los Angeles, San Francisco, Boston, and California—mandate green building. These mandates have also fueled proactive integration of green building elements in other localities before such elements are mandated and result in an unknown amount of capital expenditures and risk down the road. While it is clear that the green building trajectory has held steady during the early stages, it is less clear whether it will persist into the future as the economics of green development become more apparent.

## Lack of Green Data

Until recently, data regarding the direct economic impact of green building on operational expenses and returns on investment have lagged. Instead, the efficacy of green buildings was based on soft data indicating that green buildings are linked to relatively intangible benefits, including improved corporate images, increased employee productivity, lower energy bills, decreased risks of incurring environmental compliance related capital expenditures, and greater occupancy rates.

For many, operational data are not necessary to decide to invest in green buildings. Not surprisingly, these players have primarily been corporate owner-occupiers, the federal government, and universities—all parties benefiting from the ongoing utilization of green buildings. In contrast, insti-



tutional developers have been slower to jump onto the bandwagon partially due to the lack of data regarding the economic benefits, if any, of investing in green buildings. Recent studies, however, may provide the hard data that institutional developers need to incentivize investment in green buildings.

## Green = Increased Costs?

The additional up-front costs of constructing a commercial green building constitute the primary risk in green building investment. These costs comprise those associated with obtaining certification (e.g., certification fees and delayed timelines due to required approvals) and those incurred in the process of meeting green specifications (e.g., purchasing specific materials and equipment). Various reports, including those by the Burnham-Moores Center for Real Estate (2008) and Costar Group (2010), indicate that these increased costs are approximately 2% to 7% higher than comparable conventional buildings. More specifically, the cost premium for LEED certification, from certified to platinum, ranges from approximately 0.6% to 6.7%, respectively. Other unofficial surveys of parties who have met LEED certification indicate a cost premium of about 3% for

# Is It Worth the Cost?



certified buildings and 5.5% for silver buildings. In contrast, the University of Reading, UK and the United States Green Building Council have concluded that constructing a LEED building, at the certified level, results in no significant cost premium. Regardless of the difference in opinions, it is reasonable to estimate that the cost premium for a green building ranges from 2% to 7%, depending on the type and level of certification.

Nevertheless, some developers have proffered the ante and bet that the up-front costs of constructing a certified green building are outweighed by short-term operational savings and long-term returns on investment. In fact, RREEF Research data demonstrate that enough institutional developers placed this bet in the past few years to expand their green development activities 22% faster than corporate activities and 50% faster than government activities. And now, these developers can rest a bit easier, because despite the recent economic recession, data from several recent studies show that their bets have been relatively safe.

## Green = Value Premiums?

On the flip side, as reported in the *Journal of Sustainable Real Estate* (2009), several studies have concluded that green buildings achieve greater rent and sales prices than conventional buildings. Although these studies do not agree on the exact economic benefit derived from green building investments, they all attribute at least some positive economic correlation. For example, the University of Reading, UK concluded in 2008 that Energy Star and LEED buildings command a 4% to 5% premium, respectively, on contract rental rates. In terms of sales premiums, a study by Norm Miller, Jay Spivey and Andy Florance (2008) and a report by Eichholtz, Kok and Quigly (2009) indicate a range of 10% to 25% for LEED buildings and 5% to 25% for Energy Star buildings.

In addition to rent and sales premiums, recent data indicate that greater energy efficiency translates into not only lower utility bills but also increased property value. Commercial LEED buildings have been shown to use, on average, 24% less energy than the national average for comparable commercial buildings (with gold and platinum buildings performing 45% better) (Turner and Frankel, 2008). A \$1 savings in energy costs due to increased thermal efficiency has been shown to translate into an \$18 increase in the valuation of an Energy Star certified building (Eichholtz, Kok and Quigly, 2009). Therefore, energy efficiency improvements can be expected to play a quantifiably beneficial role in both operational expenses and returns on investment.

## Green = Good Investment?

Thus, with the benefit of hindsight, it appears that developers who jumped into the green building market over the past few years paid 3% to 7% in additional expenses to construct and certify their buildings and received immediate operational savings coupled with rental premiums of 4% to 5% and sales premiums of 10% to 25%. In addition, these developers likely received tax benefits, lower vacancy rates, and faster market absorption. Whether these numbers will hold up in the long term and increase the green building trajectory is debatable.

Rent and sales premiums vary depending on the level of certification achieved and the general real estate market. For example, through the recent recession, while LEED-certified buildings have maintained their rental premium, the premiums for Energy Star buildings seem to have vanished. In addition, as more green buildings saturate the market, economic benefits derived from a lack of supply will surely diminish, if not evaporate. On the other hand, as the regulatory arena moves closer toward mandating green elements, it may be that obsolete conventional buildings are the only ones feeling any significant economic impact from the green building movement.

The debate continues. ■

**Gina M. Schilmoeller** is an associate in the Washington, D.C. office of Goodwin Procter and can be reached at (202) 346-4192 or [gschilmoeller@goodwinprocter.com](mailto:gschilmoeller@goodwinprocter.com).

# QSCBs:

## The Solution to School Financing Woes?

by Bruce J. Graham and Douglas A. Praw

Public school funding is always one of the hardest hit public infrastructure sectors in tough economic times. Whether school districts derive their revenue directly from local sources or from distributions made at the state level, declining income, sales, and property taxes have severely strained the revenues of school districts and hampered the ability to finance the construction and repair of public schools. Often, public bond financing has been used to leverage a school district's revenue stream and create a source of funds for school construction. However, the uncertain and diminishing revenue sources have made bond financing difficult as well.

Responding to this situation, the U.S. Congress enacted the American Recovery and Reinvestment Act of 2009 ("ARRA") which, among other things, concluded that quality public school facilities should be a priority. ARRA contains provisions for the issuance of qualified school construction bonds ("QSCBs") to finance the construction, rehabilitation, and repair of public and charter school facilities. Are QSCBs the answer to the school financing problem?

### How QSCBs Work

There are two types of QSCBs. The first involves the issuance of QSCBs as tax credit bonds under which bondholders receive federal tax credits in lieu of interest payments, although this structure is utilized far less than the second type of QSCBs. The second type of QSCBs, and the subject of this article, is the issuance of QSCBs as federally taxable bonds wherein issuers of QSCBs are eligible to receive, as a subsidy, direct payments from the federal government that offset the bond interest payments. The subsidized interest payments provide relief to local districts, although the local issuer is still responsible to repay the principal amount of the bonds.

Under ARRA, QSCBs are subject to a national volume cap restricting their issuance to \$11 billion in 2009 and an \$11 billion in 2010. The Department of the Treasury further allocated the national bond volume cap among, and imposed specific dollar amount limitations on, the states, U.S. territories, and certain designated large local educational agencies. For school districts not receiving direct allocation,

to be eligible to issue QSCBs, school districts must apply for and be awarded an allocation of the volume cap allocated to the state in which the school districts are located.

The allocation of volume cap is not the only restriction imposed by ARRA. A typical QSCB financing, utilizing the federal government subsidy, must also comply with the following:

- 100% of available QSCB proceeds must be used for the construction, rehabilitation, or repair of a public or charter school facility, or for the acquisition of land on which such facility is to be constructed with part of the proceeds of such issue.
- In connection with making each QSCB interest payment to bondholders, the bond issuer will receive, as a direct payment from the federal government, the lesser of (i) 100% of its actual interest payments on the bonds, or (ii) the tax-credit rate, published daily by the U.S. Treasury, for municipal tax-credit bonds.
- The maximum maturity of QSCB eligible bonds is set monthly by the IRS. The term of a specific series of QSCBs, when issued, must not exceed the maximum maturity in place at that time.
- The QSCB issuer must enter into contract to spend at least 10% of the bond proceeds within six months after issuance and must spend 100% of the proceeds within three years after issuance. If not expended within three years, all remaining QSCB proceeds must be used to redeem the bonds.
- School projects funded with QSCBs must comply with the Davis-Bacon Fair Labor Act, which contains, among other things, federal prevailing wage requirements.

### High Tech High

California offers an excellent example of the use of QSCB financing in combination with credit enhancement. In mid-2010, the California School Finance Authority ("CSFA") turned to ARRA to issue \$12 million of federal interest subsidy QSCBs. The QSCBs have a 10-year maturity, with interest payable semi-annually and the full amount of the principal due at maturity.

## “...[ARRA] concluded that quality public school facilities should be a priority.”

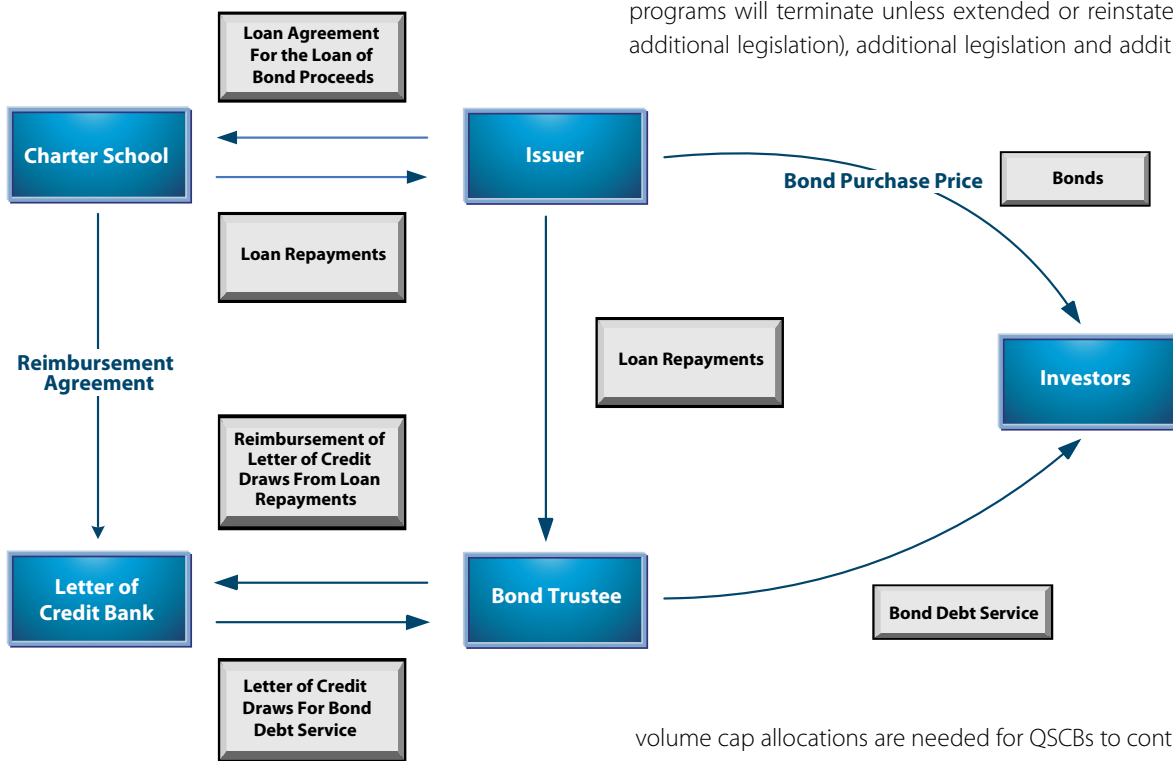
The CSFA loaned the QSCB proceeds to High Tech High, a California nonprofit public benefit corporation, for the construction of K-8 charter school facilities to be owned and operated by High Tech High in the City of Chula Vista.

Semi-annual bond interest payments and principal at maturity will be paid to investors from drawings under a direct pay letter of credit issued by City National Bank (“Bank”). Such payments are secondarily supported by a standby letter of credit issued by the Federal Home Loan Bank of San Francisco.

able High Tech High revenues. The financing structure is summarized in the diagram below.

### Are QSCBs the Answer?

While QSCBs look promising as an incentive to build public schools, their future is unclear. Congress authorized allocation in the amount of \$22 billion and has allocated all amounts in 2009 and 2010. Although the states and designated large local educational agencies are entitled to carry forward their unused volume cap allocations beyond December 31, 2010 (the date when other ARRA-created programs will terminate unless extended or reinstated by additional legislation), additional legislation and additional



The Bank will be reimbursed for drawings under its letter credit from a combination of sources. The interest payments will be reimbursed from the federal interest subsidy payments under ARRA. Although the principal amount of the QSCBs are payable to investors at maturity, High Tech High will make periodic sinking fund payments to the Bank during the term of the bonds that are derived from state payments to High Tech High based upon student attendance at the charter schools and other avail-

volume cap allocations are needed for QSCBs to continue. Thus, the future of QSCBs—and their legacy in alleviating school financing woes—rests in the hands of the federal government. ■

**Bruce J. Graham** is a partner in the Los Angeles office of Goodwin Procter and can be reached at (213) 426-2658 or bgraham@goodwinprocter.com.

**Douglas A. Praw** is a partner in the Los Angeles office of Goodwin Procter and can be reached at (213) 426-2664 or dpraw@goodwinprocter.com.



# BUILD AMERICA BONDS: Help for the Land-Secured Market?

by Robert M. Haight, Jr. and Tuan A. Pham

During the height of the economic recession in 2008-2009, state and local governments saw banks and other institutional investors retreat from the municipal marketplace, thus raising the costs of tax-exempt financing. To stem the rising costs, Congress enacted the American Recovery and Reinvestment Act of 2009 ("ARRA") which provided for the issuance of Build America Bonds, commonly referred to as "BABs." In the last two years, BABs have been widely used, making up approximately 21% of the municipal bond market, with over 1,900 bond issues in all 50 states in excess of \$164 billion. BABs have been heralded as a tremendous success, providing state and local issuers with an important arrow in their municipal financing quiver. But what portion of these issues are land-secured municipal financings? The answer is: not a lot. Why haven't land-secured municipal financings shared in the success of BABs?

## What are BABs?

BABs are bonds issued under state law that would otherwise qualify to be issued as tax-exempt bonds but for which the issuer has made an irrevocable election to issue the bonds as taxable. Under the BABs program, 35% of the interest payments on the BABs are paid to the issuer from direct payments made by the federal government (the "subsidy"). In many cases, BABs are combined with tax-exempt debt to finance the desired project.

The BABs program was designed to provide

state and local governments the option to access the corporate taxable bond market, which is broader and deeper than the tax-exempt market. It was envisioned that the expanded market for state and local bonds would have two benefits for governmental issuers. First, access to a larger market would provide the capital needed at an acceptable cost that might not be able to be raised solely in the tax-exempt market. Second, by shifting investment to BABs and away from the tax-exempt market, the supply of tax-exempt bonds would decrease, thus lowering the overall cost to issuers.

## Land-Secured BABs

Although few in number, BABs have been used as a part of land-secured financings, primarily for the following two reasons:

- **BABs Open Up New Markets:** As stated above, the main reason for issuing BABs in a land-secured financing is to access the taxable investor base. The taxable investor base is much larger than the tax-exempt base, and the larger investor base is supposed to result in a lower overall cost than a transaction that is 100% tax-exempt.
- **Savings to Property Owners:** Unlike traditional municipal debt where the issuer itself is responsible for the payment of debt service on the bonds, in land-secured financings, debt service is secured by the levy of special taxes or assessments ("impositions") on specific property. The issuer serves as the collector of the impositions, but



rarely is obligated to use its general funds to pay the debt service. For BABs, the subsidy from the federal government, while paid to the issuer, is applied directly to the debt service on the bonds, thus reducing the amount of impositions needed to be collected from property owners. In today's real estate market, anything that lowers the assessment levies on homeowners is desirable, at least from the issuer's and homeowner's perspective.

Although state and local governments have always had the ability to issue taxable bonds, the increased access when combined with the debt service savings are thought to make BABs an attractive alternative to full tax-exemption. While issuers and developers alike welcome financing tools that lower costs and increase market access, there are drawbacks to BAB financing in land-secured transactions:

- **Bonding Capacity Decreased Because of BABs:** For developers, the amount of bonds that can be issued in a land-secured district is critical. The bonding capacity of a project is determined by two main factors. The first is the voter-approved maximum annual amount of the impositions available to service the authorized debt (i.e., the annual revenue stream). The second is the interest rate on the debt to be serviced: the higher the interest rate, the greater amount of the annual revenue stream that is needed to pay interest, which results in decreased bonding capacity. Since BABs are taxable, the interest rate is higher than tax-exempt rates, which, in turn, decreases the bonding capacity. Developers and issuers must weigh the benefits of BABs against the lost bonding capacity.
- **Savings to Property Owners, Not Developers:** The subsidy is applied by the issuer of the bonds as a reduction in the amount of the annual impositions charged to property owners. Thus, any savings achieved by the subsidy inures to the benefit of the property owners, not

developers per se. The developer enjoys the savings from the subsidy only during its tenure as a property owner. In today's market, with bond issues being pushed out later in the development cycle, these savings may be immaterial or non-existent to developers.

- **No Homeowner Marketing Benefit:** Typically, land-secured investors demand that the annual amount of the impositions that may be levied on property owners equal at least 110% of the debt service due on the bonds. Developers are required by law to disclose the full amount of the potential impositions to homeowners. Because the potential impositions are sized irrespective of any subsidy, developers do not achieve any premium that might otherwise come from marketing the reduction of the imposition due to the subsidy.

### Long-Term Benefits Questionable

While BABs have been utilized extensively over the last two years, there have only been a few land-secured BABs issued. Although in theory the subsidy and the taxable market should work on land-secured bonds, the reality is that the current market for non-rated taxable land-secured bonds is very shallow. In addition, there is uncertainty as to whether BABs will be extended, made permanent, or expire at the end of 2010 only to be resurrected in future legislation. Given the questionable benefits of land-secured BABs, it remains to be seen whether issuers and developers will pursue land-secured BAB financing, if BABs are available in the years to come. ■

**Robert M. Haight, Jr.** is a partner in the Los Angeles office of Goodwin Procter and can be reached at (213) 426-2650 or [rhaight@goodwinprocter.com](mailto:rhaight@goodwinprocter.com).

**Tuan A. Pham** is a partner in the San Francisco office of Goodwin Procter and can be reached at (415) 733-6062 or [tpham@goodwinprocter.com](mailto:tpham@goodwinprocter.com).





# SUSTAINABLE development

Goodwin Procter LLP's **Sustainable Development** blog features news and resources to help professionals navigate the rapidly evolving green building and sustainable development sectors in today's real estate market.

- American Recovery and Reinvestment Act
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