

The Community Development and Housing sections of California's Health & Safety Code ("H&S") contain an Article related to Hazardous Substance Release Cleanup. This Article includes §§ 33459, et seq., and is commonly referred to as the "Polanco Redevelopment Act." Senator Polanco introduced the measure after the Redevelopment Agency for the City of San Diego was named a responsible party for groundwater contamination that resulted from historic gas station activities in downtown San Diego.

In the late 1980s, the Redevelopment Agency acquired a corner property with plans to redevelop it into a commercial retail building with living space upstairs. Although its ownership was only transitory, as is often the case with redevelopment agencies that acquire properties later developed by others, the Redevelopment Agency was named as a responsible party on a water board order relating to historic petroleum contamination throughout downtown. The specter of a public agency becoming jointly and severally liable for a cleanup order related to historic gas station activities throughout downtown San Diego was sufficiently worrisome. As a result, the California Legislature responded to Senator Polanco's bill by adopting a series of measures empowering redevelopment agencies to cause cleanup of properties within their jurisdictions and obtain immunity for liability under state law if such cleanups are conducted under certain conditions. These measures are now called the Polanco Redevelopment Act.

MECHANICS

The Polanco Redevelopment Act affords redevelopment agencies substantial discretion and authority in the cleanup process. In most cleanup situations, a responsible party retains a consultant to undertake assessment work and proposes a cleanup program to the appropriate regulating agency. Under Polanco, the redevelopment agency can request that the regulator propose a cleanup plan in the first instance. We don't suggest this approach, however, as it may not be a useful or practical procedure.

The workloads of the different regulating agencies sometimes result in redevelopment being put at the bottom of a daunting list of prior commitments. Different agencies, located throughout the state, have different resources and capacities and respond very differently to requests by redevelopment agencies. However, an agreement with a regulatory agency is required to access the valuable immunities the Act provides. In the San Francisco region, the Regional Water Quality Control Board has been extremely proactive and cooperative with regard to brownfields activities. The San Francisco Regional Water Quality Control Board has been a leader in the state in negotiating Prospective Purchaser Agreements and using other tools to assist in brownfields redevelopment. Similarly, some local agencies have been responsive and helpful.

REDEVELOPMENT AGENCY DISCRETION

The primary grant of discretion to redevelopment agencies under the Polanco Act is found at H&S § 33459.1(b)(2). In this section, an agency (which is defined as a redevelopment agency, see, H&S § 33003) has the discretion to determine three key aspects of any cleanup. First, the cleanup must be consistent with the agency's schedule for redevelopment. In certain circumstances this may preclude some types of remediation technologies because the time frame which they may require may be inconsistent with project redevelopment schedules.

Second, the redevelopment agency plays a significant role in determining appropriate cleanup guidelines (in conjunction with the regulatory community) by determining future land uses as a result of project redevelopment plans. A project redevelopment that contemplates residential use on a groundfloor level mandates different standards of cleanup (particularly under risk-based corrective action procedures) than one which anticipates the construction of a surface parking lot. The decisions about future land use can have important impacts on cleanup guidelines and rest primarily with the redevelopment agency. Lastly, the redevelopment agency is charged with the authority to determine whether a responsible party's proposed cleanup plan will be consistent with the guidelines contained in the National Contingency Plan. One presumes that this grant of authority to the agency allows an agency to find "consistency" in a manner that is appropriate to a particular project and its cleanup. The National Contingency Plan was designed to create nationwide standards for cleanup of Superfund sites. The degree to which any particular remedial effort must be consistent with this plan ought to depend, at least in part, on whether the site in question is a Superfund site or a simple underground storage tank remediation. Case law has not yet developed to the point where the courts have supported the agency's authority to make determinations of the degree of consistency required, but the grant of authority in the statute is plain and unambiguous (H&S § 33459.1(b)(2)).

THE POLANCO LEVERAGE

The primary tool that the Polanco Act uses is not dissimilar from the tools used in several federal statutory environmental schemes. As is true in the Clean Water Act, EPCRA, and certain other statutes, the mechanism starts by providing for notice to a responsible party that a remedial action plan is required, and is supported by a "fee-shifting" provision which provides that a redevelopment agency can recover its attorneys fees as part of its reimbursable "response costs." Written notice to a potentially responsible party must be responded to within 60 days with a remedial action plan. The short 60-day time limit does not allow for the time necessary to both develop and receive approval for plans as provided in H&S § 25356.1. Although practice around the state varies, it is generally accepted that the remedial action plan referred to in the Polanco Act is generic language meant to encompass any written plan to appropriately address, investigate and remediate hazardous substances, and not necessarily the statutorily defined "remedial action plan" found elsewhere in the Health & Safety Code.

If timely response to a request for remedial action plan is not received, the redevelopment agency may itself propose a plan and undertake investigation and

remedial activities with the approval of an appropriate regulatory agency. The appropriate regulatory oversight was originally limited to a state agency such as the Regional Water Quality Control Boards or the Department of Toxic Substances control, but the Polanco Act was amended to also include a local agency if the Cal-EPA site designation procedures are used. Those procedures are found under the Unified Agency Review of Hazardous Materials Release Sites, see, H&S §§ 25260 - 25268.

With appropriate agency oversight, the redevelopment agency may proceed to undertake the necessary work. Again, similar to the mechanism found in certain federal statutes, if an agency has to take action on its own and seek recovery through a civil action, a fee shifting provision provides that it may also recover its reasonable attorneys fees and costs. (See, H&S § 33459.4(a))

Two case studies come to mind that illustrate different approaches to using the Polanco Act. Both of these derive from situations in the City of San Diego. The Redevelopment Agency for the City of San Diego has established a corporation, wholly owned by the City, which acts as its operating arm for redevelopment activities within the downtown jurisdiction. This corporation is called the Centre City Development Corporation (CCDC), and it has achieved notable successes in downtown redevelopment, including Horton Plaza, the Gaslamp area, Little Italy, and many others. David Allsbrook is in charge of acquisitions for CCDC, and for the last decade has worked with Richard Opper of Foley & Lardner as special environmental counsel for Polanco Act matters. The following two case studies reflect their approach to using the Polanco Act in different situations.

THE DOWNTOWN "BLOB"

As the genesis of the Polanco Act began with San Diego's downtown subsurface petroleum contamination, it is appropriate to review how the Act has been used to help resolve that problem. In the late 1980s it was believed that the entire downtown area was underlain with extensive petroleum contamination. During the course of ten years of study (and millions of dollars of assessment and investigation expense) it has gradually emerged that rather than one large undifferentiated petroleum plume, there are several smaller pockets of contamination, generally related to the locations of service stations or underground storage tank facilities in the area. CCDC ended up as one of a handful of responsible parties named in a Water Board Cleanup and Abatement Order. CCDC, and the Redevelopment Agency it serves, were anxious to find some mechanism to shift responsibility for responding to the joint Water Board Order away from itself and toward one of the historic dischargers. Historical investigations were required to reconstruct a timeline of activities on the site in question. More than one national oil company had, at one time or another, occupied the property or, in some cases, acted as a franchisor for an independent operator. Unfortunately, tenancy of the oil companies was too remote in time to satisfy the local RWQCB that they were a "discharger," so it was unwilling to issue a Cleanup and Abatement Order naming them.

Action was brought against the oil companies in state court. Eventually, CCDC was able to locate an elderly gentleman who had once worked at the gas station. He

was willing to sign a declaration that an oil tank, which was removed in the 1940s, came out of the ground “looking like Swiss cheese.” This declaration and the pendency of a civil action brought under the Polanco statute for cost reimbursement was sufficient to bring the oil companies into a mediation. The mediation took place relatively early in the litigation, and, in hind-sight, it is clear that the potential for liability for both defense costs and plaintiff’s costs, as well as reimbursement for cleanups costs, resulted in settlements acceptable to all parties. The power of the Polanco “fee shifting provision” was used in this instance to obtain reimbursement for past costs and indemnification for future costs under the joint RWQCB order. This exercise demonstrated the strength of Polanco even when used without regard to its immunity provisions, which have become so attractive to the developer community and its lenders.

SAN DIEGO DOWNTOWN BALLPARK

CCDC’s most ambitious use of Polanco was undertaken as part of a broader strategy to acquire property which would be jointly developed in combination with the San Diego Padres to relocate the baseball team to a new downtown venue. The project includes not only land necessary for the construction of a ballpark, but adjacent retail development and several hotels and office buildings. In all, the ballpark district represents a 26-city block wide development proposed as a public-private venture between the city, the baseball club, and a large local development firm. The site is located in an area of downtown that had more than 100 years of activities, including a manufactured gas (or “town gas”) plant, light manufacturing, warehousing, and even older uses such as blacksmithing, foundry work, used battery storage and miscellaneous other businesses. The subsurface was also underlaid with fuel oil distribution pipes owned and operated by a local utility as well as a national oil company. Over five dozen underground storage tanks were either known or suspected within the project area. An agreement was struck where the city agreed to acquire the property and assemble the site for the project. Ultimate build-out is projected in excess of one billion dollars.

Unfortunately, historical uses of the site had inevitably left pockets of contamination from fuel oil, gasoline, other petroleum products, as well as volatile organic compounds and heavy metals. Because the site encompassed over 150 parcels and over 50 different owner groups, a decision to rely on the Polanco Act to cause property owners to undertake an investigation of their own property seemed the only prudent and logical course of action.

Polanco letters issued *en masse* early in the project, with 60-day notices requesting the provision of all existing information (see, H&S § 33459.1(e)) and the proposal of remedial action plans to adequately assess and investigate suspected hazardous substances in the subsurface.

Care was taken to assemble packages of information for each property owner spelling out the basis for the city’s activity and its authority under the Polanco Act. The package included proposed agreements entitled “Cooperative Remediation Agreements” wherein property owners were given an option to step outside of the statutory Polanco process and, if desired, enter into cooperative agreements for investigation and remediation.

Response to the packages was mixed, with some property owners choosing to enter into the Cooperative Remediation Agreements while others did not. Eventually, however, almost all property owners in the project area chose to cooperate with CCDC in a program designed to complete investigation and assessment of hazardous substance releases. Working cooperatively with the property owners, CCDC proposed agreements that would allow property owners to use their own consultants, either at their own expense, or with funding provided by CCDC.

Public funding for the investigation and remediation came by virtue of offsets from acquisition funds. Working in conjunction with eminent domain counsel for CCDC, Polanco causes of action were linked to eminent domain causes of action. Deposits of fair market value included an offset of the estimated cost of assessment and remediation. In our view, there was clear authority for the proposition that contamination was a blight upon the property and justified an offset to the fair market value appraisals which were undertaken as though the properties were not burdened by any contamination and were, in fact, "clean." The condemnation acquisition funds were offset to provide the necessary funding to cure environmental conditions at the site, which, with the owners' cooperation, can in most cases be done efficiently and at a lesser cost.

The remediation activities were designed to occur in conjunction with demolition of structures so as to further reduce costs by enabling heavy equipment to quickly excavate and transport soils contaminated with hazardous materials to appropriate facilities. Favorable disposal prices were negotiated as a result of the higher volume obtained by doing the work in a coordinated fashion. When completed, Polanco will provide that immunity which attaches (under state law) so that the developers, their successors and, most importantly, their lenders have the security of knowing that they will be held harmless from those historical impacts.

CONCLUSION

The Polanco Act is available to assist brownfields development whenever it occurs within the jurisdiction of a redevelopment agency. Many cities and counties in California have created redevelopment agencies. In other words, many areas within the state (excepting military bases and certain other government lands) are within the jurisdiction of some redevelopment agency. This provides a basis for cooperation between the public sector and the private sector to obtain all available information with regard to environmental conditions, and cause investigations and remediation to occur as needed for the project, consistent with project schedules and state law.

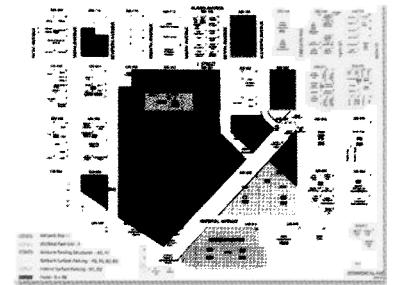
The Act can be used whether the redevelopment agency is contemplating eminent domain or not. Its most powerful lever is the "fee shifting provision," but its most attractive aspect is that successful assessment and remediation results in immunity for developers and their successors. It is an important element to the brownfields redevelopment toolbox.

CASE STUDY – THE SAN DIEGO BALLPARK

Initially conceived from a broad study of the East Village Area of San Diego's downtown, the challenge to the legal team was to create a systematic approach to a wide variety of environmental conditions.



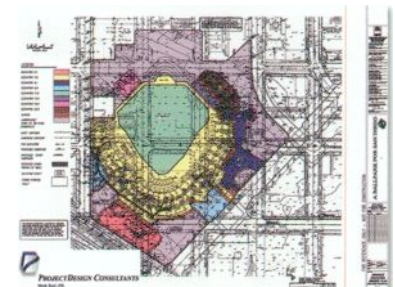
The city's original plans called for \$1 billion of new development for the ballpark, including multiple hotels, retail uses and office space. A public park provides an amenity for non-game days.



Close coordination between the landowners, the regulators and the developers highlighted the environmental conditions at the site. Close coordination with Environmental Business Solutions, the consultants for the project, was essential to the project's success.



A master work plan was developed to ensure all problems were addressed, as well as ensuring that unnecessary remediation was avoided.



Work on the project was completed on time (despite aggressive schedules) and under budget. The project represents one of the most ambitious undertakings using the Polanco Redevelopment Act that have yet occurred in California.

