Impact of AB 26 on the Polanco Redevelopment Act
Issues and Recommendations

Produced by members of the Legal Issues Subcommittee of the CRA Brownfields Committee, this document is intended to provide general guidance on this topic. Answers to questions related to AB 1X 26 are not free from doubt. Thus, individual cities and agencies should consult with and follow the advice of their own attorneys concerning application to their own circumstances.

Q: Can redevelopment agencies use the Polanco Redevelopment Act until the dissolution date of February 1, 2012 or until they are dissolved (if the date is extended)?
A: As long as the redevelopment agencies do not incur new debt, they can continue to use the Polanco Redevelopment Act. (*See* §§ 341262(a) and 34163(b).). In addition, if the Polanco Redevelopment Act is being used on an "enforceable obligation", successor agencies may continue to use it. (See §34167(a).) While § 34165(f) and (g) specifically precludes agencies from commencing certain types of legal actions, Polanco actions are not prohibited. It is also possible that agencies could use the Polanco Redevelopment Act to preserve or maintain asset value (§ 34167(a)), however it is likely that such actions would be closely monitored and may in fact conflict with the legislative directive that an agency not incur new debt.

Q: Can redevelopment agencies execute settlements until February 1st (or until they are dissolved)?
A: In order to maximize assets and minimize liabilities, redevelopment agencies can execute settlements until dissolution. (See § 34167(a).) However, these agreements may be subject to challenge because of the explicit provision prohibiting redevelopment agencies from entering into any contracts. (See § 34163(b).) Thus, the conflicting provisions in the legislation leave the settlements vulnerable to challenge.

Q: What happens to pending Polanco Redevelopment Act litigation after February 1st?
A: Successor entities to the former redevelopment agencies assume any authority, rights, powers, duties, and obligations previously vested with the former redevelopment agencies. (§ 34173(a) and (b).) This effectively means that the former redevelopment agency transferred its interests to the successor entity, thus, CCP § 368.5 would apply and the action can continue. We recommend that successor agencies identify themselves and their purposes in some formal way, perhaps by adopting a resolution.

Additionally, if the city that authorized the creation of a redevelopment agency elects to retain the housing assets and functions previously performed by the redevelopment agency, all rights, powers, duties, and obligations of the agency transfer to the city. (§ 34176(a).) Therefore, for housing assets and functions, the successor city could potentially continue the Polanco Redevelopment Act action, but this authority is likely limited to sites within redevelopment project areas (or impacted by a release from a property within a redevelopment plan area) and for the life of the redevelopment plan.

Q: Can successor agencies use the Polanco Redevelopment Act?
A: Yes, if required to wind down redevelopment agency activities while preserving the value of assets OR as a result of prior enforceable obligations. (§§ 34167(a), 34173(b).) In

addition, successor agencies are required to "[e]nforce all former redevelopment agency rights for the benefit of the taxing entities, including, but not limited to, continuing to collect loans, rents, and other revenues that were due to the redevelopment agency. (See § 34177(f), emphasis added.) In this context it is also important to distinguish between the successor entities and a city or county that elects to take on a redevelopment agency's housing assets and functions. In that "housing" capacity, § 34176(a) provides that "all rights, powers, duties, and obligations [of the dissolved redevelopment agency] . . . shall be transferred to the city, county, or city and county."

Q: Does a Successor entity need direction from Oversight Board to utilize the Polanco Redevelopment Act?
A: Legal counsel are split on this issue. Some have stated that successor agencies need approval/consent from the Oversight Board on matters which would impact the assets which will be distributed to the taxing entities. (§§ 34179(i), 34181(a).)

Other legal counsel believe that the successor entity can use the Polanco Redevelopment Act so long as it is in accordance with §§ 34167(a) and 34173(b). Further, it is again important to distinguish the situation where the successor entity has also taken on the "housing assets and functions." In that capacity, there does not seem to be oversight by the Oversight Board. (§ 34177(j) [budget to be prepared and submitted to the Oversight Board not spelled out in terms addressing housing assets and functions]; § 34180 [list of activities subject to prior Oversight Board approval, which does not make reference to actions taken in connection with housing assets and functions]; § 34181(c) [directing Oversight Boards to "transfer" housing responsibilities but not directing them, post-transfer, to exercise any further oversight or supervision].)

Q: Can an Oversight Board direct the successor entity to clean up property and recover costs or initiate litigation to compel clean up even if it requires the successor entity to incur debt in the short-term?
A: Yes, provided it is for the benefit of the taxing entity. (See §§ 34167(a), 34177(f).) However, "disposal"of a former redevelopment agency asset"is to be done expeditiously and in a manner aimed at maximizing value." (§34177(e).) The Polanco Redevelopment Act process and litigation related thereto, on the other hand, can take time. The oversight board appears to have the authority to decide if it is in the taxing entity's best interest to move forward with litigation by conducting a cost benefit analysis under § 34179(c). Still, the legislation is vague respecting the actual process the oversight board would use to authorize litigation.

Q: Do immunities received under prior Polanco Redevelopment Act closure extend to successor agencies or cities that receive housing assets?
A: Yes. These immunities would also extend to anyone who purchased the property from the successor entity. (§34173(b); § 33459.3(e)(2), (3).)

Q: Is there any pending legislation that would specifically grant successor entities the authority to utilize the Polanco Redevelopment Act?

A: There is no current pending legislation that would grant successor entities or anyone else authority to use the Polanco Redevelopment Act. However, AB 1235, which was tabled in September 2011, proposed to add section 33459.7 to the Polanco Redevelopment Act. This new section would have applied all authority, rights, powers, duties, and obligations, and protections afforded to a redevelopment agency under the Polanco Redevelopment Act to a successor entity, as defined, for any property that was within a redevelopment project area of a redevelopment agency that has been dissolved by an act of the Legislature. However, based on the comments above that cities acquiring housing assets and successor agencies have the authority to utilize the Polanco Redevelopment Act already under AB 26, we note that this specific legislation may not be necessary.

Miscellaneous Issues

Q: Can a successor entity be assigned an EPA grant and implement the grant?
A: Yes, as long as it does not require the entity to incur debt. (§ 34173(b).)

Q: Are Successor Entities BFPPs (Bona Fide Prospective Purchasers) Eligible For Favorable Treatment Under Federal Law

A: For purposes of EPA grants, EPA has informally indicated that the successor entities will be treated as coming into ownership of contaminated property by operation of law and thus eligible for "involuntary transferee" status under the relevant sections of the federal Superfund statute (i.e., 42 U.S.C. §§ 9601(20)(D) and 9601(35)(A)(ii).) As a result, they should remain eligible for EPA grant and loan funding programs. But the successor entity qualifies as a favorably treated "innocent landowner" or BFPP only if it was not previously a responsible party. For example if a City were a responsible party, because its corporate yard operations contributed to some contamination, and it sold the property to the redevelopment agency, the mere fact that the property is being transferred back to the City as the successor entity does not make the City an innocent purchaser. Quite the opposite, the city retains its original responsible party status.

A somewhat different analysis must be considered relative to parties other than EPA, i.e., those historic owners, operators, and others with liability for contamination and cleanup costs. Relative to claims by those parties against a successor entity, EPA's informal interpretation likely provides no relief whatsoever. Inasmuch as § 34173(d)(1) and § 34176(a) gave cities and counties the option of not becoming successor entities (generally and on housing assets and functions, respectively), successor entities may find it impossible to qualify as "involuntary" transferees. Further, inasmuch as the successor entities likely did not have time or resources to comply with the so-called AAI (All Appropriate Inquiry) requirements before becoming successor entities and thus owners of these sites, the successor entities may have no defense to liability under the Superfund statute. Section 34173(e) does generally limit the successor entity's liability to the total sum of property tax revenues it receives and the value of assets it obtained through the redevelopment agency's dissolution, but that limitation is purely a matter of state law. Federal constitutional law may render the liability limitation provision in § 34173(d) irrelevant in federal court proceedings; indeed, there is Ninth Circuit precedent supporting that result. Successor entities can

certainly argue that they should be considered innocent landowners, that they should be treated the same as Bona Fide Prospective Purchasers, and that equitable considerations should result in them bearing little or no liability for the cleanup of a contaminated site. But it is an open question whether such arguments will prevail.

Close consultation with counsel may be particularly important with respect to assets that have contamination issues.

Q: What if the EPA money requires matching funds from the receiving entity? Does the oversight board have the discretion to accept this?
A: The oversight board has fiduciary responsibilities to the holders of enforceable obligations and taxing entities (§34179(i)). Thus, to the extent that the grant would provide a benefit to such entities, the oversight board has discretion to accept the matching requirements. (Approval of a matching requirement amounting to less than 5% of the grant is not required (§34180(e).))

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