Urban Redevelopment and Assembly Bill 440 – the "New" Polanco Act

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Notes:

NEW OPPPORTUNITIES FOR BROWNFIELDS CLEANUP

THE GATTO ACT

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Statutory Background

From the 1960s through the 1980s, Congress sought to address degradation of the nation's air and water by enacting the Clean Water Act and the Clean Air Act. In response to Times Beach and Love Canal, whereby single family homes were built on former toxic waste dumps resulting in increased birth defects and cancer clusters, Congress enacted the Resource Conservation and Recovery Act,[1] mandating cradle to grave management of hazardous wastes, and the Comprehensive Environmental Response Compensation and Liability Act[1] ("CERCLA;" commonly referred to as the "Superfund") to address cleanup of hazardous substances. Congress intended for polluters to pay for cleaning up hazardous substances. Congress defined the term "polluter" broadly to include owners and operators at the time of the release, current owners, anyone who arranged for the disposal of hazardous substances and transporters. Additionally, the liability is "joint and several" meaning that one party can be responsible for cleaning up the entire problem regardless of the extent of that party's culpability.[1] Given this draconian liability scheme, it is no wonder that developers shy away from contaminated properties and even those properties perceived to be contaminated.

"Brownfields" are abandoned, idle or underutilized industrial properties the redevelopment of which is complicated by real or perceived environmental contamination. Brownfields are the result of the aggressive liability scheme in the federal and state environmental laws. Since 1990, several states and ultimately Congress have enacted legislation to address brownfields and entice developers to reuse urban, infill properties.

In 2013, the California Legislature adopted AB 440 to fill one of the holes left with the elimination of redevelopment agencies. While the State intended to fill its budget gap by redirecting tax proceeds to the State and other taxing agencies, elimination of redevelopment agencies effectively withdrew one of the most powerful brownfields tools, the Polanco Redevelopment Act[i] (Polanco Act). The Polanco Act authorized redevelopment agencies to compel cleanup in redevelopment project areas and recover the full costs of cleanup, including attorney's fees and staff costs, from recalcitrant responsible parties. It also granted legal immunity to the redevelopment agency, the redeveloper, and lenders for hazardous substances releases cleaned up under an approved cleanup plan.

The Polanco Act is still a valid law, but now can only be used if a redevelopment successor agency has an enforceable obligation mandating cleanup of a specific property in a former redevelopment project area and the funding for the cleanup, or at the very least, the regulatory

oversight costs, have been approved by the Department of Finance as appropriately on the Recognized Obligation Payment Schedule. Otherwise, the law has no further application. Meanwhile, contamination or the threat of contamination still serves as a blighting influence in many California communities because of the fear that contamination can derail development timelines and financial projections. The resulting brownfields serve as a catalyst for community degradation. Even if a developer wants to reuse contaminated property, in the post-recession real estate market, finding a lender to loan on the project can be challenging.

Brownfields Solutions

The solution to the brownfields problem comes in two forms. The first is monetary relief in the form of grants and loans or tax credits that alleviate the financial burden associated with cleaning up contamination. The second is addressing the liability. The Polanco Act sought to address the liability concern by providing immunities for the redevelopment agency, the redeveloper and its lender. It also addressed the costs of cleanup by providing powerful cost recovery tools to recover not only the cost of cleanup from recalcitrant parties, but also attorneys' fees and staff costs.

Assembly Bill (AB) 440, unofficially known as the "Gatto Act," became effective on January 1 of this year and provides local agencies -- including cities, counties and successor housing authorities -- with a tool similar to the Polanco Act. In sponsoring AB 440, Assemblymember Gatto recognized that blight in the form of contaminated properties remains a critical issue in the wake of redevelopment dissolution. He also realized that to be meaningful, the Polanco Act model needed to be available on a broader scale to cities, counties and housing authorities, rather than just to redevelopment successor agencies. As a result, the Gatto Act provides many of the same benefits as the Polanco Act. It provides California cities and other local agencies (namely counties and successor housing authorities) with the authority to compel cleanup of contaminated properties. As a result, cities can employ the Gatto Act anywhere within their jurisdictions,[ii] thus expanding this powerful tool for use nearly statewide.

This expansion of the Polanco authority raised some concerns in the Governor's office leading to a series of amendments. The differences between the Polanco Act and the Gatto Act can be a trap for the unwary. But first, a discussion of the similarities.

The Polanco Act Compared To The Gatto Act

Procedurally, both laws utilize a process much like nuisance abatement. Before the city can take action to clean up property, it must give the responsible party[iii] the opportunity to clean it up. If the responsible party fails to respond or fails to clean up the property in compliance with an agreed-upon schedule, the city can enter onto the property, conduct the site investigation and clean up and sue to recover its costs.

Like the Polanco Act, the Gatto Act provides the following benefits for cities:

- It allows cities to require landowners to turn over environmental assessment information[iv];
- it provides immunities to the city, the redeveloper and its lenders for any release or releases of environmental contaminants addressed in an approved cleanup plan[v];
- it provides extensive cost recovery provisions that include recovery of city staff time and attorneys' fees in addition to the actual cleanup costs [vi];
- it can be used to cleanup petroleum contamination[vii];
- the city does not have to undertake the cleanup can "cause" a third party to do the work[viii]; and
- the city can take title to the property during the cleanup without entering into the chain of liability[ix].

Although the Legislature stated its intentions that the Gatto Act serve as the policy successor to the Polanco Act, and that existing case law used to interpret the Polanco Act be used to interpret the Gatto Act[x], the two laws are not identical.

First, the terminology in the Gatto Act differs from the Polanco Act. Instead of referring to a "remedial action plan," the Gatto Act refers to a "cleanup plan[xi]." The Gatto Act also uses the definition of "hazardous materials[xii]" instead of "hazardous substances." And the law added definitions of "blighted area[xiii]," "blighted property[xiv]," "investigation[xv]," "investigation plan[xvi]", "phase I investigation[xvii]" and "phase II investigation[xviii]."

Unlike the two-part definition of blight under the former redevelopment law, the definition of "blighted area" for the purposes of the Gatto Act is defined as "an area in which the local agency determines there are vacancies, abandonment of property, or a reduction or lack of proper utilization of property, and the presence or perceived presence of a release or releases of a hazardous material contributes to the vacancies, abandonment of property or reduction or lack of proper utilization of property."[xix] By design, the definition to a large extent mimics the definition of a brownfield under federal law[xx].

Before giving notice to the responsible party to investigate and clean up a property, however, the city must find that the property is a blighted property in a blighted area. This finding was not required under the Polanco Act because that law was only available for use in redevelopment project areas. Redevelopment agencies had already found that the properties were blighted when they put the properties into the project areas, thus avoiding the need to make a separate blight finding when using the Polanco Act.

The Gatto Act also has some limitations not found in the Polanco Act. For example, when properties are already under regulatory oversight, the city must meet and confer with the appropriate regulatory agency before employing the statute[xxi]. The regulatory agencies were concerned that a City could interfere with ongoing regulatory oversight. However, if the responsible party has entered into a Voluntary Cleanup Agreement with the Department of Toxic Substances Control ("DTSC") and the city and DTSC cannot agree on the city's use of the Gatto

Act, the Lead Agency Designation Committee, sitting without the DTSC representative, serves as the neutral arbiter[xxii].

Importantly, the Gatto Act does not require consistency with the National Contingency Plan, which is the Superfund process for cleaning up properties under federal law. Since the court in *Redevelopment Agency of the City of San Diego v. Salvation Army*[xxiii] held that strict compliance with the National Contingency Plan was not a requirement for cost recovery, the purpose of the Polanco Act's National Contingency Plan consistency requirement was confusing. Accordingly, the Gatto Act replaced this obligation with robust public participation requirements[xxiv].

Concerned that some overzealous local agency's staff might use the Gatto Act to harass property owners, the Legislature provided a right to appeal the notice to clean up the property. The responsible party has 30 days to appeal the responsible party determination to the City Council. The appeal period stays the other timelines in the Gatto Act until the appeal is heard, but any challenges to the legislative body's determination can only be made in the cost recovery action following the cleanup[xxv].

Additionally, several procedural differences exist between the Polanco Act and the Gatto Act. First, the Gatto Act does not require the city to request cleanup guidelines.

Second, regulatory oversight occurs much earlier when using the Gatto Act. Regulatory oversight commences at the site investigation stage rather than later at the cleanup plan stage[xxvi]. If the property is not fully characterized, meaning that the lateral and vertical extent of the contamination is not fully demarcated, the responsible party or the city submits an investigation plan to the applicable regulatory agency for review and approval.

Two Polanco Act cases, one published and one unpublished, established that failure to comply with the notice requirements bar cost recovery.[xxvii] While the regulatory agencies would prefer that their oversight commence at the investigation stage, hopefully the courts will not extend this body of case law to the obligation to give notice to compel a site investigation.

Because a drawn-out site investigation can stall the reuse of the property, regulators must review the investigation plan within 30 days of receipt[xxviii]. Following the investigation in accordance with an agreed upon schedule, the responsible party has 60 days to prepare a cleanup plan[xxix].

Other notable differences between the Gatto Act and the Polanco Act include:

1) A right of entry for the city to conduct site investigation or cleanup[xxx]. Under redevelopment law, redevelopment agencies could use eminent domain law to access property to conduct environmental site assessments. Because cities cannot use eminent domain for economic development, the statute grants a right of entry.

2) The Gatto Act provides authority for the city to make the initial determination whether a cleanup plan is acceptable based on the intended use of the property and the development timeline[xxxi].

3) In response to the legislative mandate for DTSC to recover its costs, more detail on the obligation of the city or the responsible party to pay oversight costs[xxxii] was included in the statutory language.

4) And the Gatto Act cleaned up the language relating to the conditional immunities letters that are issued concurrently with the cleanup plan approval[xxxiii].

Undeniably, the most significant difference between the Polanco Act and the Gatto Act, however, is not statutory, but structural. Former redevelopment agencies could float bonds secured against future tax increment to pay for cleanup costs. Cities currently do not have that option. Instead cities must use scarce general fund money or money from developers who agree to fund the work. This may result in greater emphasis on the cost recovery provisions in the new law.

In the years immediately following promulgation of the Polanco Act, some regulatory agencies were apprehensive about overseeing cleanups that would result in certain parties gaining immunities. However, with the enactment of AB 440, the regulatory community (DTSC and the Water Boards in particular) has immediately focused on how to work with cities and other local agencies to implement the statute. Shortly after Governor Brown signed the new law, DTSC convened a meeting with Water Board representatives, EPA and the attorneys who worked on AB 440 with Assemblyman Gatto, to discuss its implementation. Both DTSC and the Water Boards are now considering standard oversight agreements with cities—similar to the environmental oversight agreements former redevelopment agencies used with DTSC. The regulators have requested that sites be assigned to the regulatory agency through the EPA brownfields "MOA" process[xxxiv]. The regulators also suggested that, especially for time-critical clean ups, the city serve as lead agency for CEQA compliance purposes.

Conclusion

The loss of redevelopment will be felt by Californians in many ways as the tools that served to revitalize our urban landscapes no longer exist. Despite concerns about the lack of upfront funding to initiate clean up, the Gatto Act restores authority for municipalities to compel cleanup of contaminated properties. Overall it provides cities a new, but familiar tool, to combat blight throughout the state.

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[i] Health & Safety Code section 33459 *et seq.*
[ii] Health & Safety Code section 25403.1(a)(1)(A).
[iii] For the definition of responsible party see, Health & Safety Code section 25323.5(a) or Water Code section 13304(a).
[iv] Health & Safety Code section 25403.1(f).
[v] Health & Safety Code sections 25403.2(c) and 25403.3.
[vi] Health & Safety Code section 25403.5.
[vii] Health & Safety Code section 25403(i).
[viii] Health & Safety Code sections 25403.2(a)(1) and 25403.6.
[ix] Health & Safety Code section 25403.6(a).

[x] Health & Safety Code section 25403.8.
[xi] Health & Safety Code section 25403(c).
[xii] Health & Safety Code section 25403(i).
[xiii] Health & Safety Code section 25403(a).
[xiv] Health & Safety Code section 25403(b).
[xv] Health & Safety Code section 25403(j).
[xvi] Health & Safety Code section 25403(k).
[xvii] Health & Safety Code section 25403(n).
[xviii] Health & Safety Code section 25403(o).
[xix] Health & Safety Code section 25403(a).
[xx] 42 USC section 9601 (39).
[xxi] Health & Safety Code section 25403.1(a)(1)(B) and (C).
[xxii] Health & Safety Code section 25403.1(a)(1)(C).
[xxiii] 103 Cal.App.4th 755 (2002).
[xxiv] Health & Safety Code section 25403.7.

[xxv] Health & Safety Code section 25403.1(b)(3)(C).
[xxvi] Health & Safety Code section 25403.1(a)(2).
[xxvii] *Anaheim Redevelopment Agency v. Union Pacific Railroad*, Cal. App.,Unpub. Lexis 5566 (2003); See also, *Redevelopment Agency of the City of Stockton v. Burlington Northern & Santa Fe Railway Corp.*, 2007 U.S. Dist. LEXIS 44287 (2007).
[xxviii] Health & Safety Code section 25403.1(a)(3).
[xxix] Health & Safety Code section 25403.1(b)(2)(A).
[xxx] Health & Safety Code sections 25403.1(a)(1)(A) and 25403.1(f)(2).
[xxxi] Health & Safety Code section 25403.1(b)(2)(B)(i) and (ii).
[xxxii] Health & Safety Code section 25403.4.
[xxxiii] Health & Safety Code section 25403.1(a)(5).
[xxxiv] The MOA was developed by CalEPA to avoid forum shopping between regulatory agencies. Anyone wanting regulatory oversight of a brownfield fills out an application. DTSC and the Water Boards meet to review and discuss the applications and assign the sites to the regulatory agencies taking into account factors such as end use of the property, the potential impacts to ground or surface waters, the capacity of the agencies and whether there was any past regulatory action and if so, by which agency.