

Clean Up That Mess!

PROPERTY OWNERSHIP IS A CHERISHED RIGHT, BUT it also involves significant responsibilities. One of them is an owner's duty to clean up polluted land.

Approximately 90,000 properties around the state sit idle or are underutilized because of real or perceived

environmental contamination. To deal with this problem, the California Legislature in 1990 enacted a measure to encourage private parties to develop such properties. The statute, commonly known as the Polanco Redevelopment Act, accomplishes this by alleviating most of the legal risks associated with cleanup (Cal. Health &

Saf. Code §§ 33459–33459.8).

Although this law has had the intended effect of getting polluted property cleaned up and redeveloped, it is rife with perils for unsuspecting owners. Local and regional redevelopment agencies can operate like mini-EPAs, issuing cleanup orders for sites they do not own (§ 33459.1(a)(1)), or acquiring prop-

erty through eminent domain and then funding cleanup with money recovered from the owners and potentially responsible parties (PRPs) (§ 33459.1(a)(1)).

The Polanco Act prescribes the processes for cleaning up polluted properties in redevelopment areas, while providing immunity to agencies and subsequent property purchasers who clean up sites under an approved plan. Redevelopment agencies have broad authority over cleanup activities; the law states that they may take "any actions" they deem necessary to remedy or remove a release of pollutants, whether the agency owns the property or not (§ 33459.1(a)(1)).

Scrap yards, vacant lots, defunct gas stations, and abandoned warehouses are the properties most often targeted. Own-

ers of such properties should know the likelihood that hazardous substances are present, as well as the potential for use of the Polanco Act to clean them up.

The statute defines a "responsible party" extremely broadly—including any current owner and operator of the subject facility; owners or operators of the facility at the time of disposal of any hazardous substance; any person who arranged for disposal or treatment of any hazardous substances; and any person who accepts hazardous substances for transport to disposal or treatment facilities (see § 33459(h)).

If there are no PRPs, the current owner may shoulder all responsibility (§ 33459.4(a)). Therefore, anyone considering a property acquisition should conduct a thorough investigation into historical uses of the site to gauge the potential risk of hazardous substances.

After a redevelopment agency receives cleanup guidelines from the Department of Toxic Substances Control (DTSC) or one of the state's regional water quality

control boards, it must submit a remedial action plan to the DTSC or water board for approval before proceeding with the work. Although a redevelopment agency must provide notice to both the relevant administrative body and the PRP, the act requires only *one* notice to the PRP. If a PRP fails to respond within the specified time frame, the agency need not provide further notice, even if new hazardous substances are found or if additional remediation measures are deemed necessary.

A remediation plan can be costly to prepare. A PRP that becomes aware of a contamination problem can either draft and submit a plan for approval within 60 days, or allow the redevelopment agency to prepare the plan.

The defenses under the Act are specific and hard to prove. A responsible party can challenge liability by showing that it acquired the property after disposal or placement of the hazardous substance occurred; that the party was unaware (and had no reason to know)

that hazardous substances had been disposed of; or that the property in question was acquired by inheritance or bequest.

Additionally, an otherwise responsible party can challenge liability by demonstrating that the release of hazardous substances was caused by an act of God, war, or by the act or omission of a third party. The PRP must establish that it exercised due care with respect to the subject hazardous substance and took precautions against foreseeable acts or omissions of any third party and the resulting foreseeable consequences.

A lawyer counseling a potentially responsible party should ensure that the appropriate governmental agencies follow statutory procedures to guarantee the property owner's due process rights. And if remediation costs are assessed, the lawyer should make certain that they are calculated fairly and correctly. ●

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