

## *The Polanco Act's Second Act: Assembly Bill 440*

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In 2011, in response to significant budget challenges, California abruptly dissolved over 400 redevelopment agencies (RDAs) created by local governments to remediate urban decay.<sup>1</sup> This action allowed the State to facilitate the transfer of the substantial funds amassed by RDAs to support other local government agencies.<sup>2</sup> But it also had significant repercussions for the cleanup of contaminated property, because the RDAs had primary authority to expedite removal and remedial activities using powers granted by the Polanco Redevelopment Act (Health & Safety Code, §§ 33459-33459.8) ("Polanco Act").<sup>3</sup> The State provided certain measures, such as the creation of successor agencies, to facilitate the winding down of the RDAs' brownfield remediation activities, but siphoned off most of the RDA's resources (e.g., all unencumbered funds, the proceeds from asset sales, and revenues from tax increment financing programs went elsewhere) and largely suspended any new activities.<sup>4</sup> The dissolution legislation also failed to clearly specify how successor agencies could continue to exercise the RDA's Polanco Act authority to facilitate cleanup activities.<sup>5</sup>

The possibility that the changes in the law might have rendered successor agencies unable to complete and carry on the important cleanup work undertaken by RDAs was a significant concern that drew the interest of several legislators. The RDAs' authority to use the Polanco Act to compel cleanup of contaminated properties in redevelopment project areas provided a crucial alternative to cleanups driven by resource-constrained state agencies (namely the Department of Toxic Substances Control (DTSC) and the Regional Water Quality Control Boards (RWQCB)) and this authority was worth preserving – for existing and future projects.<sup>6</sup>

### **AB 440: Resuscitating Local Authority to Remediate Brownfield Sites**

Early attempts to address the shortcomings in the dissolution legislation failed to deliver a solution. Bills introduced in 2012 were fatally stalled in the Senate.<sup>7</sup> However, in 2013, Assembly Bill (AB) 440 (Gatto) garnered the necessary support to preserve the Polanco Act's historic power to pursue redevelopment and associated cleanup activities at the local level.

True to its author's intent, AB 440 largely "replicate[s] the authority and immunity from future liability provided by the Polanco Redevelopment Act for local government in general."<sup>8</sup> Similar to RDAs under the Polanco Act, "local agencies" (a county, city, city and county, or housing authority) pursuant to AB 440 may "take any action . . . necessary and . . . consistent with other state and federal laws to investigate or clean up a release on, under, or from blighted property . . . within a blighted area within the local agency's boundaries due to the presence of hazardous materials."<sup>9</sup> Prior to taking any such action, however, the local agency must notify DTSC or the appropriate RWQCB of its intent to clean up a release on property already subject to some form of cleanup order and furthermore must submit

investigation and cleanup plans to DTSC or the RWQCB for review and approval.<sup>10</sup> The department or regional board must, in turn, provide input on the local agency's proposals within specified timeframes.<sup>11</sup> Other significant provisions shared (or largely shared) between the Polanco Act and AB 440 include the ability to further delegate oversight authority,<sup>12</sup> authority to order property owners to undertake preliminary investigations (i.e., Phase I and/or Phase II studies),<sup>13</sup> and immunity from liability under state hazardous substance responsible party laws for the local agency that (1) remedies or removes a hazardous substance release pursuant to the oversight and notification provisions<sup>14</sup> or (2) compels a responsible party to clean up a property.

## **Expanded Authority for Local Agencies**

Notwithstanding many similarities in terms of notice requirements, state agency oversight, and immunity incentives, AB 440 introduced several innovations to the local brownfields cleanup authority, some of which were necessary due to the inherent differences between RDAs and local agencies, and others which were not. Chief among the changes is an expanded scope of cleanup authority under AB 440, which allows local agencies to use Polanco-like powers "anywhere within their jurisdiction, not just in redevelopment project areas."<sup>15</sup> In addition, AB 440 vests local agencies with the power to enter a property to conduct, and receive reimbursement for, an initial site assessment that will be used to determine if an investigation is necessary.<sup>16</sup> This change, rooted in the different regulatory powers of RDAs and local agencies, eliminates the need to resort to eminent domain to secure access to a property and could significantly reduce the administrative hurdles to pursuing cleanup activities through local channels.

AB 440 additionally introduces a new dispute resolution process to resolve conflicts between local agencies and either DTSC or a RWQCB when the local and state agencies have competing interests in overseeing a particular cleanup (i.e., when the site is on the National Priority List or otherwise subject to an existing cleanup action being pursued by the state agencies).<sup>17</sup> For such sites, the local agency must give the state agency advance notice of its intent to issue a notice to the "responsible party" (e.g., the site owner or operator).<sup>18</sup> The DTSC/RWQCB has 30 days to object to that advance notice. "If the local agency and the department or the regional board cannot reach a mutually acceptable resolution . . . , the matter shall be submitted to the site designation committee,"<sup>19</sup> which the Legislature established in 1993 to designate a single agency as the agency in charge of administering a cleanup in instances where multiple agencies have jurisdiction over a contaminated site.<sup>20</sup> The site designation committee must resolve any disputes within 45 days of their presentation by majority vote.<sup>21</sup> The committee includes representatives from DTSC and the State Water Resources Control Board, and these representatives may not participate in the decision if their respective agencies are involved in the dispute.<sup>22</sup> The committee is, however, otherwise comprised entirely of other state agency representatives – local interests are not represented.<sup>23</sup> Whether the site designation committee will prove to be an effective forum for resolving disputes remains to be seen.

## **Expanded Opportunities for Focused Public Participation**

In lieu of the lengthy and complicated process that an RDA would have undertaken to establish a redevelopment plan and concomitant redevelopment area, AB 440 imposes a detailed public participation requirement on the development of a cleanup plan. The required steps obligate the local agency to notify other agencies of the plan's existence, post notice of the plan at the contaminated site and in community newspapers, provide procedures for accepting public comments, and hold a public meeting if one is requested.<sup>24</sup> The local agency furthermore must "consider any comments received before submitting the proposed cleanup plan for approval."<sup>25</sup>

Significantly, the law does not impose a requirement for the agency to prepare a response to comments. Nevertheless, when developing a contentious plan, it would be prudent for an agency to chronicle its consideration of any comments submitted in writing to discourage subsequent litigation.

## **Expanded Rights for Property Owners and other Responsible Parties**

In addition to giving the public an expanded role in the creation of cleanup plans, AB 440 also gives responsible parties an opportunity to appeal a local agency's direction to prepare an investigation or cleanup plan within 30 days of receiving a notice to propose such plans (the "60-day notice").<sup>26</sup> The appeal consists of a hearing before the local agency's governing body and is largely limited to challenging whether the local agency has identified the right party. Failure to include other responsible parties in the initial notice is not a basis for an appeal.

If a responsible party fails to respond to the local agency's notice (or similar cleanup notice from DTSC, a RWQCB or the California Environmental Protection Agency)<sup>27</sup> within 60 days of notification, the local agency may proceed with planning for and implementing a remedial action. In addition, if the responsible party fails to perform pursuant to any plan or other arrangements made with the local agency, the agency can assume control of the cleanup.<sup>28</sup> Responsible parties will be liable for cost recovery actions brought by the local agency, which is in turn liable to the state agencies for reimbursements of their oversight costs.<sup>29</sup> The statute of limitations for local agencies to file any cost recovery actions expires three years after the completion of the cleanup.<sup>30</sup>

## **Conclusion**

The loss of the Polanco Act redevelopment authority was an unfortunate, and arguably unintended, casualty of the backlash against funding mechanisms that left RDAs flush with funds while other government programs (especially schools) struggled to craft achievable budgets.<sup>31</sup> AB 440 seeks to remedy the consequences of that action and in the process attempts to create a better organized and broader authority that could maximize the value of RDA assets being disposed of as the operations of these entities are terminated, encourage infill development now and in the future, and generally expedite the cleanup of environmental contamination. Although some entities, including environmental justice advocates, have expressed concern that the general purpose local agencies (cities, counties, etc.) lack the expertise of DTSC, the RWQCBs, and even RDAs, and consequently might approve sensitive land uses on property that has not been properly remediated,<sup>32</sup> these concerns do not account for the multiple points of state agency oversight, as well as the public participation opportunities, designed to guard against carelessness in the administration of the program. It remains to be seen whether AB 440 will live up to its promise to provide continued access to a brownfield remediation tool that has proven to be so valuable in the past.

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- <sup>1</sup> Assem. Bill 26, 2011-2012 1st Ex. Sess. (Cal. 2011), [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0001-0050/abx1\\_26\\_bill\\_20110629\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0001-0050/abx1_26_bill_20110629_chaptered.pdf) (Blumenfeld) (hereinafter "AB 1x26"). Due to a legal battle over the constitutionality of AB 1x26, RDAs were not officially dissolved until February 1, 2012. (Sen. Committee on Budget and Fiscal Review, Analysis of Assem. Bill 1484, 2011-2012 Reg. Sess. (June 26, 2012), [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1451-1500/ab\\_1484\\_cfa\\_20120626\\_132336\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1451-1500/ab_1484_cfa_20120626_132336_sen_comm.html), at p. 1.)
- <sup>2</sup> *Cal. Redevelopment Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 246, 250.
- <sup>3</sup> The Polanco Act, enacted in 1990, provided RDAs with the tools to facilitate, and if necessary, order, the cleanup of a release of hazardous substances in the area of a redevelopment project. (*Redevelopment Agency v. Salvation Army* (2002) 103 Cal.App.4th 755, 765; *Redevelopment Agency of San Diego v. San Diego Gas & Electric Co.* (2003) 111 Cal.App.4th 912, 917.)
- <sup>4</sup> *Cal. Redevelopment Ass'n v. Matosantos*, *supra*, 53 Cal.4th at p. 250.
- <sup>5</sup> Assem. Comm. on Env'tl Safety & Toxic Materials, Analysis of Assem. Bill 440, 2013-2014 Reg. Sess. (Apr. 16, 2013), [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0401-0450/ab\\_440\\_cfa\\_20130416\\_092711\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0401-0450/ab_440_cfa_20130416_092711_asm_comm.html), at pp. 3-4 (recognizing that "[d]espite the Legislature's effort to pass some blanket bills which transferred all development powers of RDA's to local government or local housing authorities, it is the opinion of the legislative council [sic], CalEPA and private developers that this does not obviously extend to Polanco Act powers).
- <sup>6</sup> Ambiguities aside, Polanco Act authority alone could not support new local cleanup projects because such authority could only be used "within redevelopment areas, which will be phased out of existence with the end of RDA's." *Id.* at p. 4.
- <sup>7</sup> *Id.* at p. 5 (discussing AB 1235 (Hernandez) and SB 1335 (Pavely)). Both measures stalled in the Senate in 2012.
- <sup>8</sup> *Id.* at p. 4.
- <sup>9</sup> Compare Health & Safety Code, § 33459.1, subd. (a)(1), with Assem. Bill 440, 2013-2014 Reg. Sess. (Cal. 2013), [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0401-0450/ab\\_440\\_bill\\_20131005\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0401-0450/ab_440_bill_20131005_chaptered.pdf) (hereinafter "AB 440") (section 1, adding, § 25403.1, subd. (a)(1)(A) to the Health & Safety Code).
- <sup>10</sup> Compare Health & Safety Code, § 33459.1, subd. (a)(1), with AB 440 (section 1, adding to the Health & Safety Code, § 25403.1, subsd. (a)(1)(B) and (a)(2) (requiring an RDA to submit a cleanup or remedial action plan to the department or a regional board for approval before taking action to remedy or remove a release)).
- <sup>11</sup> The Polanco Act required that the state resource agencies provide "cleanup guidelines" within a "reasonable period of time." (Health & Safety Code, § 33459.1, subd. (a)(1).) In slight contrast, AB 440 requires that DTSC and/or the RWQCB respond within 30 days of receiving an investigation plan and within 60 days of receiving a cleanup plan. (AB 440 (section 1, adding to the Health & Safety Code section 25403.1, subsd. (a)(2)-(3).)
- <sup>12</sup> Health & Safety Code, § 33459.1, subd. (d); AB 440 (section 1, adding to the Health & Safety Code, § 25403.1, subd. (e)).
- <sup>13</sup> Health & Safety Code, § 33459.1, subd. (e); AB 440 (section 1, adding to the Health & Safety Code, § 25403.1, subd. (f)).
- <sup>14</sup> The immunity does not apply in situations where the local agency fails to perform remedial work in compliance with the approved cleanup plan. Under such circumstances, DTSC or a RWQCB can require that the agency take additional action. (AB 440 (section 1, adding to the Health & Safety Code section 25403.1, subd. (a)(7)).) The Polanco Act included similar immunity limitations. (Health & Safety Code, § 33459.1, subd. (a)(2).)

- <sup>15</sup> AB 440 Fact Sheet – Brownfield Cleanup (Feb. 25, 2013), <http://www.climateplan.org/wp-content/uploads/2013/03/AB-440-FACT-SHEET.pdf>.
- <sup>16</sup> AB 440 (section 1, adding to the Health & Safety Code section 25403.1, subd. (f)(2)).
- <sup>17</sup> *Id.* (section 1, adding to the Health & Safety Code section 25403.1, subd. (a)(1)(B)).
- <sup>18</sup> “Responsible party” is fully defined to mean any person who would be liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607, with some exceptions.
- <sup>19</sup> *Id.* (section 1, adding to the Health & Safety Code, § 25403.1, subd. (a)(1)(C)).
- <sup>20</sup> Health & Safety Code, § 25261.
- <sup>21</sup> *Id.* (section 1, adding to the Health & Safety Code, § 25403.1, subd. (a)(1)(C)).
- <sup>22</sup> *Id.*
- <sup>23</sup> In addition to the Director of DTSC and the Chairperson of the State Water Resources Control Board, the committee includes the Secretary for Environmental Protection, the Director of Fish and Game, the Director of the Office of Environmental Health Hazard Assessment, and the Chairperson of the State Air Resources Board.
- <sup>24</sup> *Id.* (section 1, adding to the Health & Safety Code, § 25403.7).
- <sup>25</sup> *Id.*
- <sup>26</sup> AB 440 (section 1, adding to the Health & Safety Code, § 25403.1, subd. (c)).
- <sup>27</sup> *Id.* (section 1, adding to the Health & Safety Code, § 25403.1, subd. (b)(2)(A)).
- <sup>28</sup> *Id.* (section 1, adding to the Health & Safety Code, § 25403.1, subd. (b)).
- <sup>29</sup> *Id.* (section 1, adding to the Health & Safety Code, §§ 25403.4, 25403.5, subd. (a)).
- <sup>30</sup> *Id.* (section 1, adding to the Health & Safety Code, § 25403.5, subd. (d)).
- <sup>31</sup> Indeed, the when disbanding RDAs, the Legislature initially sought to provide a mechanism for communities to revive their redevelopment programs. (See AB1x27 (2011, Blumenfeld).) However, the California Supreme Court, in a case challenging the constitutionality of the dissolution act (AB1x26) and AB1x27, held that RDAs could be dissolved, but not selectively reinstated. *Cal. Redevelopment Ass’n v. Matosantos*, *supra*, 53 Cal.4th 231.
- <sup>32</sup> Assem. Floor Analysis of Assem. Bill 440, 2013-2014 Reg. Sess. (Sept. 12, 2013), [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0401-0450/ab\\_440\\_cfa\\_20130912\\_221714\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0401-0450/ab_440_cfa_20130912_221714_asm_floor.html), at p. 7 (discussing concurrence in Senate amendments).