

## **A New Weapon for Local Governments to Combat Consequences of Contaminated Property**

**By: Wentzelee Botha, Scott Patterson and Matthew McDonald**

In early 2012, local municipalities suddenly had to reevaluate their means for addressing blighted and contaminated properties within their districts. Redevelopment agencies throughout the state no longer existed. Though the full impact of the dissolution was yet to be determined, it was evident that one of the strongest tools in the local municipality's arsenal for combatting contaminated sites was likely left powerless with no agency to enforce its provisions. Successor agencies to the redevelopment agencies could fully implement projects already underway prior to the dissolution, but it was unclear how or if these agencies, as well as cities and counties, could use the Polanco Redevelopment Act to implement investigation and cleanup of hazardous sites any longer.

Nearly a year later, the California legislature addressed the vacuum created by this dissolution. AB 440, signed into law by Governor Brown on October 5, 2013, now allows cities and counties to institute cleanup actions with similar power and protection once afforded under the Polanco Act. AB 440 shifts the cost of investigation and cleanup from municipalities directly to the party or parties responsible for the pollution. More importantly, AB 440 allows immunities to attach to the remediated property, which is then transferable to future buyers, developers, and lenders. Property that would have remained vacant and underutilized for fear of acquiring contaminated property and the potential liability that comes with it, can now not only be cleaned up, but also developed for future beneficial uses. Local agencies now gain by the increase in market value as a result of the immunities.

Under AB 440, local agencies, defined as both cities and counties, can take any action they deem necessary to investigate and cleanup a release of hazardous substances on blighted property within their jurisdictional boundaries. Some provisions are similar to the Polanco Act but provide more structure to the administrative process, such as timelines for agency and responsible party action. If the local agency does not own the subject property, it may only take the actions specified above if there is either no responsible party or the responsible party fails to timely implement an investigation and cleanup plan.

Additionally, like Polanco, the immunities attach only for the releases specifically identified in the approved cleanup plan. Any release not identified, and any subsequent release, will not receive the protection of these immunities. Therefore, it is in the local agency's best interest to conduct a thorough investigation to include as much data as possible in its cleanup plan to have the broadest immunities attach.

AB 440 has several new provisions and requirements not contained in Polanco. The new bill requires a determination of blight prior to commencing any action. A determination of blight

requires the local agency to attribute vacancies, abandonment or reduction in property utilization to the presence or perceived presence of a release of hazardous substances. Once such a determination is made, the local agency must contact the Department of Toxic Substances Control (DTSC) or the appropriate Regional Water Board prior to issuing a notice. A particular difference from Polanco is the ability of either DTSC or the Regional Water Board to object to the local agency issuing a notice if the property is already subject to a cleanup order.

Upon meeting the above requirements, the local agency must submit an investigation and cleanup plan prepared by an independent qualified contractor. Unlike Polanco, the plans are now subject to public participation requirements outlined in section 25403.7. Though this may require additional time prior to initiating cleanup activities, it allows interested stakeholders to participate in the remediation and redevelopment of the property. Once approved, DTSC or the Regional Board must acknowledge in writing that upon proper completion of the cleanup plan, the immunities provided by the statute shall apply.

Responsible parties may now appeal a notice issued by the local agency, a provision also not available under the Polanco Act. The responsible party must file a written appeal which can only be upheld if the local agency's decision to name a responsible party is not supported by substantial evidence. In addition, a local agency's failure to name all responsible parties is not a defense. Any costs incurred by the local agency can still be recovered against any responsible party.

AB 440 has gone into effect on January 1, 2014. Local agencies, as well as the state as a whole, will greatly benefit from the advantages of this law. Cities and counties, which only a year ago were left wondering how to address contaminated sites after the dissolution of redevelopment agencies, now have the same strong tool to spark not only redevelopment within their jurisdictions, but to clean up the environment without shouldering the cost.

Contact:

Wentzelee Botha, Esq. ([wbotha@brownandwinters.com](mailto:wbotha@brownandwinters.com))

T: 760-633-4485

**Brown & Winters**