Redevelopment Rewind: A Look at the Current Status of Public and Private Brownfields Redevelopment

This article was originally published in the Summer 2015 issue of *Environmental Law News*.

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INTRODUCTION

In addition to being eyesores, contaminated properties are commonly believed to contribute to an increase in crime and the downfall of neighborhoods, often accompanied by the relocation of business and residential communities. Local agencies and communities have a strong interest in facilitating the redevelopment of Brownfields[1] to prevent the loss of business and the associated tax revenues. And blighted neighborhoods, often located in urban areas, can be prime locations for "infill development" as both commercial and residential developers seek proximity to downtown areas. But despite these very real incentives for Brownfields development, there is a natural tension between state and federal environmental laws designed to impose liability on responsible parties for contamination, and the desire of companies, communities and investors to take on the risk of redeveloping Brownfields.

Environmental laws typically seek to ensure innocent parties do not bear the burden of contamination for cleanup of contaminated properties, and therefore first and foremost impose liability on the contaminating party. This usually means the owners and/or operators at the time of a release of contamination are primarily responsible for cleanup.[2] However, in an effort to avoid placing the burden of remediation on the public at large, these laws also usually extend cleanup liability to current owners. As a result, when the contaminating party is gone or recalcitrant, the current property owner can be left holding the bag. This possibility makes buying or investing in a Brownfield a risky proposition.

In an effort to minimize the risk of liability, the California State Legislature has repeatedly endeavored to incentivize Brownfields redevelopment. One notable example is the Polanco Redevelopment Act[3] and its successor statute AB 440 (Gatto).[4] At the federal level, Congress has taken an interest in the issue by adding and elaborating upon defenses to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),[5] such as the innocent landowner and bona fide prospective purchaser defenses. However, recent CERCLA decisions suggest the protections afforded by these defenses are difficult to obtain.

This article provides an overview of the current status of redevelopment in California after the demise of the Polanco Act, and explores the remaining risks of engaging

in Brownfields redevelopment in light of the current status of CERCLA's defenses. We further explore some strategies regarding how to structure deals to provide a mOdicum of comfort to prospective Brownfields purchasers.

THE RISE AND FALL OF THE POLANCO REDEVELOPMENT ACT

In 19451 the California Legislature enacted the Community Redevelopment Act,[6] to assist local governments in pursuing redevelopment and rehabilitation of blighted areas. In 1951, the legislature superseded the Community Redevelopment Act with the Community Redevelopment Law.[7] The linchpin of these redevelopment laws was the power granted to cities and counties to establish redevelopment agencies ("RDAs") to facilitate redevelopment. A RDA is a separate legal entity, established by ordinance of the relevant local government,[8] to facilitate redevelopment within the local government's jurisdiction.[9] Pursuant to statute, a redevelopment agency was authorized, among other things, to "prepare and carry out plans for the improvement, rehabilitation, and redevelopment of blighted areas."[10] In addition, RDAs were allowed to accept certain financial assistance from public or private sources.[11]

The Community Redevelopment Law also provided funding from local property taxes to promote redevelopment. In particular, it established the authority for tax increment funding, which is a public financing method designed to subsidize redevelopment and community-improvement projects through future increases in property taxes.[12] Specifically, tax increment funding uses the future increase in property taxes generated by the redevelopment projects to fund those projects. Redevelopment agencies were required to pass a portion of their tax increments to local taxing agencies within their project areas.

In 1990, the California Legislature adopted the Polanco Redevelopment Act,[13] which enacted a hazardous substance release cleanup program as part of the California Community Redevelopment Law. The Polanco Redevelopment Act provided a means for redevelopment agencies and private parties to clean up contaminated properties within a redevelopment project area and to obtain immunity from liability under California law for doing so.

A. The Polanco Redevelopment Act Provided Redevelopment Incentives and Protections

While the early laws were clearly designed to encourage redevelopment, the Polanco Redevelopment Act specifically authorized RDAs to undertake actions "consistent with other state and federal laws," "to remedy or remove a release of hazardous substances on, under, or from property within a project area," whether or not the RDA owned the property.[14] This power was granted to RDAs only in circumstances where (i) there was no identified responsible party, (ii) the identified responsible party was notified by either the RDA or another government agency with environmental oversight responsibilities that it was responsible to provide a remedial action plan and to agree to implement that plan within a specified period, but the responsible party failed to agree, or (iii) the responsible party entered into an agreement to prepare a remedial action plan, but failed to comply with that agreement.[15] Thus, consistent with the requirements of the oversight agencies—usually the California Department of Toxic Substances Control or the California Regional Water Quality Control Boards [16]—the Polanco Redevelopment Act provided RDAs a specific tool to either undertake the redevelopment of contaminated property, or to force the "responsible party"[17] to do so. "While redevelopment agencies have used their powers in a wide variety of ways, in one common type of project the redevelopment agency buys and assembles parcels of land, builds or enhances the sites' infrastructure, and transfers the land to private parties on favorable terms for residential and/or commercial development."[18]

Perhaps the most important feature of the Polanco Redevelopment Act was its immunity provision. The Polanco Redevelopment Act provided RDAs who undertook cleanup, or caused a responsible party to undertake appropriate cleanup pursuant to the Act, with immunity from liability from most potentially applicable State environmental cleanup laws.[19] This immunity extended to purchasers of the property who had entered a redevelopment agreement with the agency, as well as those providing financial support to the person acquiring the property for redevelopment.[20] Thus, the Polanco Redevelopment Act took affirmative steps to reduce the risk of developing Brownfields. However, being a State law, the scope of Polanco's immunity provisions were limited. In particular, nothing in the Polanco Redevelopment Act protected against CERCLA liability.

"Responding to a declared state of fiscal emergency, in the summer of 2011 the Legislature enacted two measures intended to stabilize school funding by reducing or eliminating the diversion of property tax revenues from school districts to the state's community redevelopment agencies."[21] Assembly Bill X1-26 dissolved all RDAs, barring them from engaging in new business and requiring their windup and dissolution.[22] Assembly Bill X1-27 offered an alternative, allowing RDAs to continue to operate if the local agencies that created them agreed to make payments into funds benefiting schools and special districts.[23] The constitutionality of these bills was challenged through litigation. The California Supreme Court determined that ABX1-26 was constitutional, while ABX1-27 was not.[24] Pursuant to the California Supreme Court's decision, all of the State's RDAs were officially dissolved as of February 1, 2012.[25] Without RDAs to implement it, the Polanco Redevelopment Act was rendered largely meaningless.

To help facilitate the dissolution of the State's numerous RDAs, Successor Agencies were established to manage ongoing redevelopment and the obligations of the RDAs.[26, 27] As the Successor Agencies went about their work of dissolving the RDAs, the State Legislature went to work on a successor statute to fill the shoes of the Polanco Redevelopment Act. Introduced by Mike Gatto, Chair of the State Assembly Committee on Appropriations, Assembly Bill 440 (Gatto) was approved by the Governor on October 5, 2013 as an amendment to the California Health and Safety Code.[28]

AB 440 made no pretense of being anything other than a reworked version of the Polanco Redevelopment Act: "The Legislature finds and declares that this chapter is the policy successor to the Polanco Redevelopment Act...and shall be interpreted and implemented consistent with that act. It is further the intent of the Legislature that any judicial construction or interpretation of the Polanco Redevelopment Act also apply to this chapter."[29]

B. Redevelopment Redux—AB 440 (Gatto) Perpetuates, and Potentially Expands, the Polanco Redevelopment Act

Conceptually, AB 440 and the Polanco Redevelopment Act are very similar. Much like Polanco, AB 440 permits a local agency[30] to: "take any action that the local agency determines is necessary and that is consistent with other state and federal laws to investigate or clean up a release on, under, or from blighted property that the local agency has found to be within a blighted area within the local agency's boundaries due to the presence of hazardous materials following a Phase I or Phase II environmental assessment...whether the local agency owns that property or not."[31] Also like Polanco, AB 440 requires the local agency coordinate with the appropriate oversight agency prior to undertaking cleanup,[32] and it limits the circumstances in which the local agency may take action to those where there is no responsible party or the responsible party is recalcitrant.[33] And, importantly, AB 440 provides for similar immunity under State environmental laws to any local agency "that undertakes and completes an action, or causes another person to undertake and complete an action...to clean up a hazardous material release on, under, or from property within the local agency's boundaries" in accordance with an approved cleanup plan.[34]

But despite these overall conceptual similarities between the two redevelopment laws, AB 440 is not simply a regurgitation of the Polanco Act. The new bill contains several meaningful differences from its predecessor, which, albeit subtle in some instances, may have significant impacts on its use. It is beyond the scope of this article to undertake a line-by-line comparison of the two statutes. We instead focus on two new or different features of AB 440: (1) the new definition of the term "blighted areas" and its potential impact on the geographic scope of the redevelopment agencies' powers, and (2) the new Phase I or II requirements.

Blighted Areas Covered by AB 440. The geographic scope of the Polanco Redevelopment Act was restricted to contaminated areas within redevelopment project areas, although what constituted a "redevelopment project area" was undefined. In contrast, AB 440 applies to a "blighted area" within a local agency's jurisdiction, which is defined to mean:

> 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 hazardous material contributes to the vacancies, abandonment of property, or reduction or lack of proper utilization of property.[35]

This definition provides local agencies with significant discretion to determine that a site should qualify as a "blighted area." For example, a property need not actually be contaminated so long as there is a "perceived presence of a release" of hazardous materials which is contributing to the lack of use of the property. It appears that AB 440 was specifically intended to expand upon the Polanco Act's powers. The "Fact Sheet for AB 440 (Gatto)" by Assemblyman Mike Gatto, explains "[t]his bill would allow cities, counties, and successor housing agencies to use Polanco Act powers anywhere within their jurisdiction, not just in redevelopment project areas."[36] It is too early to determine whether local agencies will use the broad definition of "blighted areas" to vastly expand redevelopment opportunities, but it is apparent that AB 440 may be used to do so if local agencies are so inclined.

AB 440's Phase 1/Phase II Requirements. AB 440 introduces a requirement not present in its predecessor act. Under the new statute, a local agency may only take action to remediate a blighted property "following a Phase 1[37] or Phase 11[38] environmental assessment pursuant to subdivision (f)."[39] Subdivision (f) of Health and Safety Code section 25403.1 contains an information gathering provision, not unlike that contained in Polanco.[40] Subdivision (f)(1) provides that a local agency may require the owner or operator of a site to provide "all existing environmental information pertaining to the site, including the results of any phase I or subsequent environmental assessment, any assessment pursuant to an order from, or agreement with, any federal, state, or local agency, and any other environmental assessment information, except that which is determined to be privileged."[41] Where such information does not exist within the responding party's possession, custody or control, the local agency "may require the owner of the property to conduct, and to pay the expenses of conducting, an assessment in accordance with standard real estate practices for conducting phase I or phase II environmental assessments."[42] A local agency may also conduct the Phase I or Phase II itself, in which case AB 440 provides it shall have a right of entry onto the property upon reasonable notice, and may seek reimbursement for the costs of the assessment from the responsible party.[43]

The preparation of Phase I and Phase II assessments is standard practice to determine the status of a site, as evidenced by the fact that Polanco permitted the RDAs to demand their production or preparation. Thus, while the AB 440 does introduce the new requirement that a Phase I or Phase II be completed prior to local agency cleanup, that is unlikely to have significant practical ramifications on redevelopment projects. But the addition of this new requirement does raise interesting questions. For example, AB 440 provides no guidance as to when a Phase I is appropriate as opposed to a Phase II. If a Phase I is performed and contamination is suspected but never confirmed through a Phase II, does that qualify as creating a "perception" of contamination such that an area is properly considered a "blighted area"? If so, why would any local agency undertake a Phase II? As local agencies undertake development under AB 440, the questions as to its application may be rendered moot if projects go unchallenged, or they may provide a basis for litigation for more contentious projects.

While it is too soon to predict how AB 440 will impact redevelopment in California, one thing is certain: AB 440 does not remove the risk of CERCLA liability redevelopment projects faced under the Polanco Act. As discussed below, recent decisions present some formidable impediments to minimizing that risk and may have a countervailing impact on redevelopment.

CERCLA'S LIABILITY SCHEME FRUSTRATES BROWNFIELDS REDEVELOPMENT

Passage of CERCLA in December 1980 introduced a new chapter in the United States' book of environmental regulation. While a full explanation of CERCLA and its intricacies is beyond the scope of this article, its heavy-handed imposition of liability regularly strikes fear in the hearts of real property owners and developers. Few options are available to stymie its potentially expensive impact on redevelopment. The net effect over the past twenty years has been to drive development toward green fields and away from Brownfields.

A little background is in order. CERCLA Section 107 establishes the liability scheme of the statute and authorizes the United States or a state to bring actions for recovery of costs incurred in responding to the release or threatened release of hazardous substances from a facility to the environment.[44] For our purposes, a "facility" includes both the mechanism of the release (a leaking tank or industrial process) as well as the contaminated property itself.

CERCLA Section 113, added in 1986 with the enactment of the Superfund Amendments and Reauthorization Act ("SARA"), added a right for parties otherwise legally responsible for the release and attendant costs to seek contribution from other responsible parties.[45] The costs at issue in these cases typically include all investigatory, removal and remedial costs incurred as a result of the contamination, subject to compliance with CERCLA's remedial standards under the National Contingency Plan ("NCP").[46] Needless to say, the expense of cleaning up a modestly contaminated property, particularly one with impacted groundwater, can run to the millions of dollars and require many years of effort.

Congress, with significant monetary concessions from the petroleum industry, exempted releases of petroleum products (e.g., oil and gasoline) from CERCLA liability by excluding petroleum products from the definition of "hazardous substances."[47] This exclusion alone is a boon to many property owners given the very large percentage of Brownfields sites impacted by releases of gasoline and diesel from leaking underground storage tanks. However, given the relatively small size of most service station properties (as well as their typical corner locations), the petroleum exclusion tends to extricate only a modest number of properties on the redevelopment spectrum from CERCLA liability. Many larger Brownfield sites were former industrial (or military) sites adversely impacted by solvents and heavy metals that are regulated as hazardous substances under CERCLA.

After CERCLA's enactment, the courts and responsible parties struggled with the application of the statute, largely due to the often cryptic and ambiguous language of the Section 107 and codified definitions.[48] Subsequent conflicting case law has not added much clarity. In particular, the government has taken a very expansive and aggressive approach regarding the definition of responsible party—and frequently has prevailed—sweeping a large number of parties into the liability net. The uncertainty surrounding CERCLA liability results in a reluctance to redevelop Brownfields.

The primary problem for Brownfield developers stems from CERCLA's identification of "responsible parties". Under Section 107, four classes of parties are deemed liable under CERCLA—for a contaminated property: (1) the current owner or operator, (2) the prior owner or operator at the time of disposal of the hazardous substances, (3) any person who otherwise arranged for disposal of the hazardous substances, and (4) any person who transported the hazardous substances for disposal.[49] While the latter three categories are all tied in some fashion to the actual disposal (or treatment) of hazardous substances at the site, the statute imposes carte blanche liability on the current owner (or operator) of the property.[50] This strict imposition of liability shifts to the property owner the responsibility to pay for all response costs at the site irrespective of whether it actually contributed waste to the problem. While CERCLA has been championed by a "polluter pays!" slogan for decades, the current owner liability standard really means that the "property owner pays, too!" This somewhat draconian standard arises from a policy that shifts the expense of cleanup from the public to the real property owner who will presumably benefit from any site cleanup. The inherent fallacy of this policy is that it (arguably) assumes the purchase price of the property takes into consideration the cost of cleanup. At least historically, that has not always been the case.

An "owner or operator" is defined in CERCLA Section 101(20)(A)(ii) as "any person owning or operating" the contaminated property. Since this definition offers little guidance regarding the scope of the terms, courts have added flesh to the statutory bones. In light of CERCLA's policy considerations, case law has given broad meaning to "owner", finding not only the active owner of the property liable under Section 107, but also owners with only indirect involvement with such sites including absentee owners and trustees of a trust owning the property. This expansion of liability necessarily snares many investors in property, unless they can qualify for the secured creditor exemption. The property owners' conterminous liability with the tenant or facility operator who may well be liable for the disposal of hazardous substances behooves owners to structures leases, etc. to ensure appropriate indemnities and guarantees of cleanup.

Courts have also expended significant time evaluating the "owner" liability of successor corporations and parent/stockholder liability. Since CERCLA is silent on the whether such parties may be held liable, courts have taken the lead in determining whether such liability is contemplated under the statute. While the facts of each case are paramount, courts have usually adhered to state, and, where appropriate, federal common law, in

determining whether the corporate veil will be pierced or whether successor liability will be imposed. As such, parents and successors can generally anticipate and avoid liability traps, as long as they respect the autonomy of the subsidiary so as not to be deemed an operator.

As noted above, the intricacies of CERCLA liability are myriad and not for discussion in this article. The word to the wary is to enter Brownfield transactions cautiously with as much information, and time, as possible to structure the deal appropriately.

A. CERCLA Defenses Are Designed to Lessen the Blow

While CERCLA imposes strict liability on current owners of a contamimated property, it also seeks to provide a defense to innocent site owners where the contamination was entirely attributable to the "act or omission" of a third party. According to Section 107(b)(3),

> There shall be no liability under [Section 107] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom was caused solely by...(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant..."[51]

In addition, the defendant has to further affirmatively show that it exercised due care (i.e., was not negligent) with respect to the hazardous substances at issue and took precautions against foreseeable acts or omissions of third parties and the consequences that could result from such acts or omissions.[52] Courts have expounded injudiciously on the terms "solely" and "direct or indirect" contractual relationships. This last term in particular has snared many parties acquiring properties, often through the very contractual arrangements otherwise intended to limit liability.

The 1986 SARA updates to CERCLA expressly extended the due care defense in Section 107(b)(3) to innocent property owners, in part to correct the legal vagaries arising from the "contractual relationship" term. With the addition of Section 101(35)(A), Congress generally limited the term "contractual relationship" to include land contracts, deeds, easements, leases or other legal instruments to transfer title or possession of property. This provision was expanded by the Small Business Liability Relief and Brownfields Revitalization Act signed into law in January 2002 (the "Brownfields Revitalization Act").[53] The Brownfields Revitalization Act's reboot of the innocent property owner defense both amended the statute and added new sections.

This statute reflects the current state of the law and was largely intended to spur redevelopment of Brownfield properties presumably left in disrepair due to fear of CERCLA liability. Hoping to prompt investment in unutilized properties, Congress reasoned that developers would both front the investment to revitalize languishing industrial areas and simultaneously remove responsibility for site cleanup from the public. The actual results have been somewhat mixed.

The amended statute provides significant detail on how Brownfields developers can acquire property without fear of incurring significant liability. The statute clarified the innocent party (or landowner) defense, while adding two new defenses for contiguous property owners (to contaminated sites) and for a "bona fide prospective purchaser". It also defined a Brownfield site as real property, "the expansion, redevelopment, or reuse of which may be complicated by the presence of a hazardous substance, pollutant, or contaminant."[54] Of important note, however, is that "brownfields" largely excludes sites that are already subject to some form of federally imposed removal or remedial action.[55] This distinction does not have direct application to Brownfields redeveloper liability, but is important to the availability of federal brownfield revitalization funding.[56]

While sharing certain requirements with the innocent property owner defense and the bona fide purchaser defense, the contiguous property owner exemption is also unique in certain ways. Reflecting widespread concern over the vertical and lateral migration of contaminants in soil and groundwater from the release point to adjoining properties—a common occurrence for many sites contaminated with mobile chlorinated solvents—the addition excludes from CERCLA's definition of "owner or operator" a contiguous property owner if certain conditions are met.[57] Specifically, the owner of the contiguous site must show that (1) it did not contribute to the

release, (2) is not liable, or affiliated by contract or familial relation to an entity that is liable, for response costs at the contaminated site, and (3) took reasonable steps to stop or prevent the release and to prevent/limit exposure to them.[58] Echoing the requirements of the other two Brownfields defenses, the contiguous property owner must also: (1) cooperate and provide assistance and access to the parties involved in the cleanup; (2) comply with land use restrictions and not interfere with institutional controls imposed in connection with the response action; (3) comply with government requests for information; (4) provide legally required notices (regarding the hazardous substances); (5) conduct all appropriate inquiries prior to purchasing the property (more later on this item); and (6) at the time of acquisition, must not know or have reason to know of the site contamination.[59]

Given the lengthy list of requirements, the statute comfortingly adds that if a party does not qualify as a contiguous property owner, it may alternatively qualify as a bona fide purchaser.[60] With respect to the "reasonable steps" element, while the contiguous property owner need not undertake a groundwater investigation and remediation, it must consider preventing further migration or exposure through the use of vapor barriers or venting emissions from sump pumps drawing from a contaminated aquifer.[61]

Because most Brownfields developers' due diligence activities may make them aware of potential groundwater contamination beneath their properties, irrespective of source, the more pertinent Brownfields defenses are the innocent landowner defense and the bona fide prospective purchaser defense. The former applies when you look for contamination, but don't find it. The latter arises when you find the contamination, but proceed with the deal anyway.

In its current form, the innocent landowner defense retains the additions seen in SARA, and expands upon them. A landowner is still required to adhere to the elements of Section 107(b)(3) (discussed above), but Section 101(35)(A) provides an expanded laundry list of factors that must be strictly followed to escape CERCLA liability. The landowner must further establish by a preponderance of the evidence that at the time it acquired the property, it did not know and had no reason to know of the hazardous substances disposed of at the site.[62] In addition, similar to the requirements for contiguous property owners, once the contamination is discovered, the landowner must (1) cooperate and provide assistance and access to the parties involved in the cleanup; (2) comply with land use restrictions, and (3) not interfere with institutional controls imposed in connection with the response action.[63]

In order to establish the knowledge, or more appropriately "lack of knowledge" standard, CERCLA adopted an "all appropriate inquiry" standard. A landowner must establish that, pursuant to EPA regulation, it adhered to commercial standards in investigating the previous ownership and use of the property.[64] While there are some interesting complexities based on the date of property acquisition and whether the property is a non-commercially developed residence, this standard currently mandates the performance of a Phase I Environmental Site Assessment. The approved form is reflected in ASTM[65] E1527-13 which advocates both interview of a knowledgeable person(s) about past uses of the property and a detailed government file review.[66]

The landowner is also required to undertake certain reasonable steps with the respect to the property contamination. It is required to (1) stop any continuing release, (2) prevent any threatened future release, and (3) prevent or limit exposure to the contamination. On March 6, 2003, EPA issued Interim Guidance on the "reasonable steps" requirements. These steps are also for bona fide purchasers, discussed below.[67]

The bona fide prospective purchaser defense, truly unique to the Brownfields Revitalization Act, is the most significant step by Congress to promote distressed property redevelopment. It allows developers to purchase contaminated property, while ostensibly limiting their liability for the potentially widespread impacts of the contamination. However, like the defenses discussed above, the bona fide prospective purchaser has several difficult hurdles to jump to prove its innocence. In order to qualify as such a purchaser, the developer must prove that the purchase occurred after the enactment of the statute (January 11, 2002) and after disposal of the hazardous substances. In addition, it must make all appropriate inquiries prior to purchase, and undertake all reasonable steps to address the release of hazardous substances discovered as a result of the diligence.[68] These standards are the same as utilized for the innocent landowner defense, with the twist that contamination is found

through the diligence but the deal closes anyway.

Since the contamination is known to the developer it must also show cooperation with the responsible party and government in even more categories of activities. The owner must: (1) provide all legally required notices with respect to the discovery and release; (2) exercise due care by taking reasonable steps to stop any continuing release, prevent future releases and prevent exposure to the contamination; (3) cooperate with, provide assistance to, and allow access to parties to conduct the response action; (4) comply with land use restrictions; (5) not impede institutional controls; and (6) comply with governmental information requests and subpoenas.[69] Obviously, the new owner cannot be affiliated, as described above, with the old owner.[70]

Similar to the innocent purchaser defense, a bona fide purchaser can meet the appropriate inquiry standard through use of an approved Phase I. The reasonable steps requirement is decidedly thornier and depends largely on the facts of a site. While not adopted in regulation, ASTM issued its "Standard Guide for Identifying and Complying with Continuing Obligations" (E2790-11) in 2011 which focuses on compliance with these requirements.[71] The guide assumes that a Phase I has been completed and then addresses the steps to attempt to adhere to CERCLA's somewhat vague requirements.[72] Developers and their environmental contractors will find it quite useful in developing a post-acquisition compliance program to attempt to ensure the CERCLA liability limitation.

This endeavor is important because a property owner that qualifies as a bona fide purchaser is exempted from liability under CERCLA Section 107 if the owner's liability is premised solely on its status as an owner or operator of a contaminated site.[73]

B. Recent Case Law Potentially Limits the Applicability of CERCLA Defenses

While Congress was certainly well-intentioned in its passage of the Brownfields Revitalization Act, federal courts have reduced the Act's value. The few circuit courts that have had occasion to evaluate the defenses, have imposed a rigorous view of compliance with the requirements of CERCLA and its implementing regulations. Suffice to say, federal judges can be nit-picky.

In *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*,[74] a developer of a contaminated property expended at least $194,000 to characterize a large former manufacturing site in coordination with the EPA. After taking title to the property, it demolished the structures on the property, but failed to address a historic sump system designed to capture wastewater from processing operations. These sumps had deteriorated to the point that, even without operations, they presented a threat of release of hazardous substances. When a dispute arose between the developer and responsible parties over response costs, the property owner asserted the bona fide purchaser exemption. The district court and the Fourth Circuit Court of Appeals disagreed. Because Ashley failed to clean out and remove the sumps, and due to its failure to monitor and address debris piles and limestone cover on the site, the courts found that the developer did not "exercise appropriate care" at the site. As such, it was found to be liable as a current owner of the property. The courts were very particular in imposing appropriate care duties dependent on the facts of the situation and gave essentially no credit to the developer's attempts to solicit "reasonable steps" from the EPA. In fact, the record did not even indicate that the trash pile accumulating on the site contained hazardous waste.

In *Voggenthaler v. Maryland Square*,[75] the Ninth Circuit reached a similar conclusion to that of the Fourth Circuit—requiring detailed compliance with the reasonable steps requirements—but was not so draconian in its ruling. In a dispute among responsible parties over contamination associated with a Las Vegas shopping center and dry cleaning facility, Maryland Square LLC, the current owner and developer of the shopping center, sought the benefit of the bona fide purchaser defense in response to a summary judgment motion. The motion was granted on the grounds that the form of evidence was insufficient to establish the defense. The Ninth Circuit overturned the decision and remanded the issue to the trial court to give Maryland Square the opportunity to correct its formal and substantive deficiencies in proving its defense. While generous in its remand, the Ninth Circuit followed its sister court's lead in demanding details and close adherence to the statute and regulations. In particular, the court recited the requirements of the code and then identified apparent factual deficiencies by Maryland Square in compliance with those elements. Given the recitation, while

Maryland Square certainly had the opportunity to correct its evidence, it appears unlikely that it could overcome the barriers presented by the circuit court.

The net effect of these two decisions is that courts will not give carte blanche application of the bona fide purchaser defense. Significant time and resources must be expended to both comply with the requirements · of CERCLA and adequately document that compliance. In conclusion, it is questionable whether one can truly rely of any of these defenses to insulate a Brownfields developer from environmental liability. The risks are just too high.

SUGGESTIONS FOR CALIFORNIA DEVELOPERS—"OLD IS NEW"

So what is the take away from a somewhat gloomy assessment of CERCLA's Brownfields provisions? A developer cannot hang its hat on CERCLA's defenses and blithely go about redevelopment of a Brownfield site thinking it immune to Section 107 liability.[76] Similarly, it cannot ignore them because the benefit is too great if confronted with CERCLA litigation. Instead, we suggest that CERCLA's defenses be just one facet—albeit an expensive facet—of a developer's Brownfield strategy. We also suggest that developers harken back to standard practice before the Brownfields Revitalization Act was passed.

The vast majority of contaminated sites ripe for redevelopment are not subject to EPA oversight. Instead, in California and many other states, state or regional environmental agencies regulate site cleanup. In California, the two state agencies overseeing the vast majority of Brownfields cleanups—whether or not the contamination is CERCLA—regulated or a petroleum product-are the Regional Water Quality Control Boards and the Department of Toxic Substances Control. Both of these agencies were in the "brownfields" business long before Congress sought to grease the wheels of commerce. As such, commencing in the mid-1990s, California sought to ease the burden on redevelopment of contaminated parcels through parallel "prospective purchaser policies" adopted by both agencies.[77]

Essentially identical in their form and effect, the two policies were intended to enhance the redevelopment of distressed properties in California without expressly granting the new property owner a complete release from liability under California law. As explained in the State Water Resources Control Board's memo of July 9, 1996, its "Guidance Memo Regarding Brownfields: Prospective Purchaser Agreements and Agreements with Current Owners for Cleanup of Polluted Property", California sought a new method to promote cleanup of properties whose owners lacked sufficient funds to complete the work.[78] Rather than the state assuming these costs, through the Prospective Purchaser Policies, California invited developers to shoulder that burden in exchange for defined cleanup obligations and covenants not to sue if the obligations were met. While California did not have the authority to release the developer's liability and grant contribution protection against third party claims, it could bind itself not to sue. In this fashion, California correctly assumed developers would weigh the calculated risks and enter the market.

The prospective purchaser policies provide a range of options including "comfort letters" informing the new property owner that it is not considered the responsible party for site cleanup, expedited site closure letters, and detailed prospective purchaser agreements which expressly lay out the cleanup process to which a developer commits in exchange for a covenant not to sue by the agency. Prior to 2002, numerous sites were redeveloped under the aegis of these policies. Admittedly, more comfort letters were issued than prospective purchaser agreements, but this was due to fact that sellers typically funded the cleanup (using sale proceeds) rather than the developers, who remained leery of assuming cleanup obligations. But with the passage of the Brownfields Revitalization Act in 2002, followed by the 2008 downturn in the economy, a significant drop off in interest arose. Off-the-record polling of the agencies indicates, however, that their prospective purchaser policies are coming back into style as the economy rebounds. In the past year, the Regional Water Quality Control Boards have fielded numerous requests for comfort letters and more detailed Brownfields protections. What was old is now new again.

CONCLUSION

Despite the State Legislature and Congress' best efforts to incentivize Brownfields redevelopment, real hurdles remain. As is the case with many things, when approaching Brownfields redevelopment, the best defense is a strong offense. A prospective purchaser or developer needs to get up-to-date advice as to the state of the law, and must make sure to follow every step of every required process, and to

document it diligently. If they are approached head-on and with eyes wide open, the hurdles to Brownfields redevelopment do not have to be insurmountable.

ENDNOTES

1 According to the California Department of Toxic Substances Control ("DTSC"), "Brownfields are properties that are contaminated, or thought to be contaminated, and are underutilized due to perceived remediation costs and liability concerns." *See* DEPARTMENT OF TOXIC SUBSTANCES CONTROL, BROWNFIELDS, *available at* https://www.dtsc.ca.gov/SiteCleanup/Brownfields/ (last visited Jan. 6, 2015).

2 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25323.5 (defining a "responsible person" or "liable party" consistently with Section 107 of CERCLA, which considers responsible parties to be current owners/operators, owners/operators at the time of a release of hazardous substances, persons who arranged for the transportation of hazardous substances, or persons who accept hazardous substances for transport to disposal or treatment facilities [*see* 42 U.S.C. § 9607(a)(1)-(4)).]; CAL. WATER CODE § 13304 (providing for cleanup liability to a person who has discharged or discharges waste into the waters of the state or who causes or permits waste to be discharged where it probably will be discharged to waters of the state); 42 U.S.C. § 9607(a)(2) (CERCLA liability may extend to any person who owned or operated a facility at the time of disposal of a hazardous substance).

3 CAL. HEALTH & SAFETY CODE §§ 34459, *et seq.*

4 Id. §§ 25403, *et seq.*

5 42 U.S.C. §§ 9601, *et seq.*

6 California Redevelopment Act of 1945, Cal. Stats. 1945, c. 1326, p. 2478, § 1 (1945) (*superseded by* CAL. CONST. art. XVI,§ 16 and CAL. HEALTH & SAFETY CODE §§ 33000, *et seq.*)

7 CAL. HEALTH & SAFETY CODE §§ 33000, et seq.

8 *Id.* §§ 33100, 33101.

9 *Id.* § 33120.

10 *Id.* § 33131(a).

11 *Id.* §§ 33132, 33600.

12 *Id.* § 33670.

13 *Id.* §§ 33459-33459.8 (AB 3193).

14 *Id.* § 33459.1(a)(1).

15 *Id.* § 33459.1 (b).

16 In certain circumstances the RDA was enabled to designate a local agency to oversee the cleanup. CAL. HEALTH & SAFETY CODE § 33459.1(d).

17 The Polanco Redevelopment Act defines "responsible party" by reference to Health & Safety Code section 25323.5(a), and Water Code section 13304(a). CAL. HEALTH & SAFETY CODE § 33459(h).

18 Cal. Redevelopment Ass'n v. Matosantos, 53 Cal.4th 231, 246 (2011).

19 CAL. HEALTH & SAFETY CODE § 33459.3.

20 *Id.* § 33459.3(e)(2)-(4).

21 *Cal. Redevelopment Ass'n,* 53 Cal.4th at 241.

22 2011 Cal. Stat., (ch. 5); *see also id.*

23 *See Cal. Redevelopment Ass'n*, 53 Cal.4th at 241.

24 *Id.* at 242.

25 *Id.* at 275; *see also* CALIFORNIA DEPARTMENT OF FINANCE, REDEVELOPMENT AGENCY DISSOLUTION, *available at* http://www.dof.ca.gov/redevelopment/ (last visited Jan. 9, 2015).

26 CAL. HEALTH & SAFETY CODE §§ 34170, *et seq.*

27 "Successor agency" is defined to mean "the county, city, or city and county that authorized the creation of each redevelopment agency or another entity as provided in [Health & Safety Code] Section 34173." CAL. HEALTH & SAFETY CODE § 34171(j).

28 *See* CAL. HEALTH & SAFETY CODE §§ 25403, *et seq.*

29 *Id.* at§ 25403.8.

30 Where Polanco applied to Redevelopment Agencies, subsequent to the statutory repeal of the RDAs, AB 440 applies to "local agencies" which are defined to include "a county, a city, or a city and county" and housing authorities which have assumed the housing functions of a former redevelopment agency. CAL. HEALTH & SAFETY CODE § 25403(1).

31 *Id.* at § 25403.1(a)(1)(A).

32 *Id.* at § 25403.1(a)(1)(B).

33 *Id.* at § 25403(b).

34 *Id.* at § 25403.2.

35 CAL. HEALTH & SAFETY CODE § 25403(a).

36 Assemblyman Mike Gatto, 43rd Assembly District, "Fact Sheet for AB 440 (Gatto)," *available at* http://www.climateplan.org/wp-content/uploads/2013/03/ab-440-fact-sheet.pdf (updated Feb. 15, 2013).

37 "Phase I environmental assessment" is defined to mean "a preliminary assessment of a property to determine whether there has been, or may have been, a release of hazardous material based on reasonable [*sic*] available information about the property and general vicinity." To apply to AB 440, a Phase I must meet the most current ASTM requirements. CAL. HEALTH & SAFETY CODE § 25403(n).

38 A "Phase II environmental assessment" means "an intrusive study where actual physical environmental samples are collected and analyzed to characterize the type and distribution of hazardous material in the environment." It also must meet the most recent ASTM standards. CAL. HEALTH & SAFETY CODE § 25403(o).

39 CAL. HEALTH & SAFETY CODE § 25403.1(a)(1)(A).

40 *See Id.* at § 33459.1 (e).

41 *Id.* at § 25403.1(f)(1).

42 *Id.* at § 25403.1(f)(2).

43 *Id.*

44 42 U.S.C. § 9607.

45 *Id.* at § 9613.

46 *Id.* at § 9607(a)(4).

47 *Id.* at § 9601(14).

48 *Id.* at § 9601.

49 *Id.* at § 9607(a)(1)-(4). This is a paraphrased list. The actual list of responsible parties is more detailed.

50 Excluded from the definition of "owner or operator" is "a person, who, without participating in the management of [the] facility, holds indicia of ownership primarily to protect [its] security interest in [the] facility." 42 U.S.C. § 9601(20)(A). The scope of this secured creditor exemption is beyond the scope of this article.

51 *Id.* at § 9607(b)(3).

52 *Id.*

53 Pub. L. No. 107-118, 115 Stat. 2356 (2002).

54 42 U.S.C. § 9601(39)(A).

55 *Id.* at § 9601(39)(B).

56 *See generally id.* at § 9604(k).

57 42 U.S.C. § 9607(q).

58 *Id.*

59 *Id.*

60 *Id.* at § 9607(q)(1)(C).

61 *See Id.* at § 9607(q)(1)(D) and ASTM Guide E2790-11 "Standard Guide for Identifying and Complying with Continuing Obligations."

62 42 U.S.C. § 9601(35)(A).

63 *Id.*

64 *Id.* at § 9601(35)(B)(i)(I).

65 ASTM International, formerly known as the American Society for Testing and Materials, is an international standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services. ASTM 1527-13 is the ASTM Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.

66 *See generally* 40 C.F.R. §§ 312, *et seq.*

67 U.S. ENVIRONMENTAL PROTECTION AGENCY, MEMORANDUM. "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability," (Mar. 6, 2003), *available at* http://www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf.

68 42 U.S.C. § 9601(40).

69 *Id.* at § 9601(40)(C)-(G).

70 *Id.* at § 9601(40)(H).

71 *See* ASTM, "Standard Guide for Identifying and Complying with Continuing Obligations," *available at* http://www.astm.org/Standards/E2790.htm.

72 *Id.*

73 Nevertheless, if the United States carries out the cleanup, it may have a lien on the property for response costs to the extent the action increases the value of the property. 42 U.S.C. § 9607(r).

74 714 F.3d 161 (4th Cir. 2013).

75 724 F.3d 1050 (9th Cir. 2013).

76 While not discussed in this article, CERCLA's liability defenses are applicable to liability under California's CERCLA counterpart, the Hazardous Substances Account Act, codified at Health & Safety Code §§ 25299.200, *et seq.* See CAL. HEALTH & SAFETY CODE § 25323.5(b) ("For purposes of this chapter, the defenses available to a responsible party or liable party shall be those defenses specified in Sections 101 (35) and 1 07(b) of the federal act." (citations omitted)).

77 *See* DEPARTMENT OF TOXIC SUBSTANCES CONTROL, BROWNFIELDS, *supra* note 1; *see also* DEPARTMENT OF TOXIC SUBSTANCES CONTROL, PROSPECTIVE PURCHASER POLICY (June 25, 1996), *available at* http://www.waterboards.ca.gov/losangeles/water_issues/programs/remediation/brownfields/bfldppap.pdf.

78 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, MEMORANDUM, "Guidance Memo Regarding Brownfields: Prospective Purchaser Agreements and Agreements with Current Owners for Cleanup of Polluted Property" (July 9, 1996), available at http://www.waterboards.ca.gov/losangeles/water_issues/programs/remediation/brownfields/bfldguid.pdf.

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