

Statutory Tools Help Municipalities Redevelop Troublesome Brownfields

BY GIDEON KRACOV

Redevelopment of contaminated properties raises the threat of environmental liability. Such properties are "brownfields," defined as "real property, the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."

Reuse of brownfields revitalizes urban neighborhoods. A brownfield property may be a multi-acre abandoned industrial facility in a redevelopment project area or a small laundromat that can be remediated and put to mixed use to include housing and a pocket park. Perhaps the site is a gas station with minimal subsurface contamination now identified as a location for a community medical clinic.

Yet while private investors may acquire brownfields at reduced cost, accompanying liability for environmental cleanup discourages many. See generally *Fireman's Fund v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002). Because of this environmental stigma, many brownfield properties remain idle.

As a result, municipalities often are the best hope to redevelop brownfields. A municipality with a robust neighborhood revitalization program can acquire a brownfield, remediate the contamination and return the property to productive use. The municipality benefits from jobs, a cleaner environment, increased tax revenues and reduced blight.

Increasingly, the federal government and California offer statutory and administrative tools to help municipalities manage brownfield liability risk and expedite cleanup. Because of this and the availability of environmental insurance, municipalities have initiated numerous successful projects to redevelop sites.

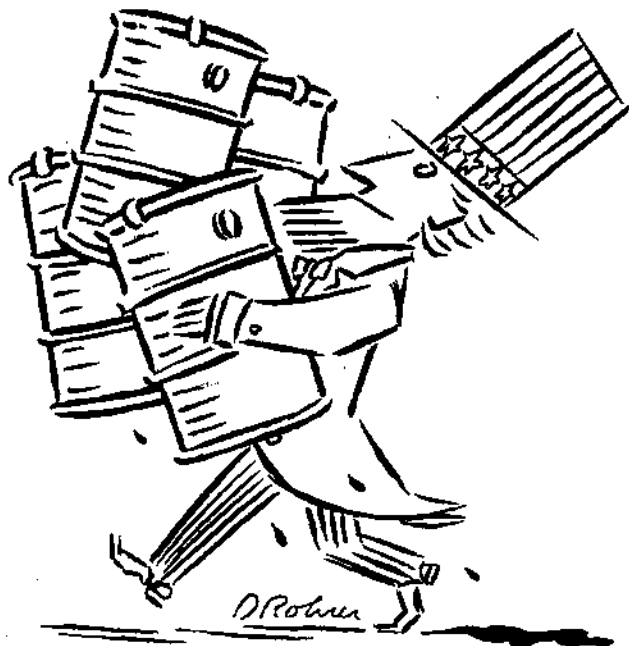
Federal Statutes and Administrative Tools

The federal Superfund statute, 42 U.S.C. Section 9604 et seq., provides a strict joint-and-several liability scheme enforced by the U.S. Environmental Protection Agency or third parties. However, municipalities that acquire brownfields can manage Superfund cleanup liability through competent environmental investigation and remediation.

Superfund offers a liability defense to a government entity that acquires a contaminated property by eminent domain and satisfies certain environmental compliance requirements. 42 U.S.C. Sections 9601(35)(A) and 9607(b)(3). The defense arises where the property is acquired by eminent domain litigation. *City of Toledo v. Beazer Materials & Servs.*, 923 F.Supp. 1013 (N.D. Oh. 1996). However, *City of Emeryville v. Elements*, 2001 U.S. Dist. LEXIS 4712 (N.D. Cal. 2001), extends the defense to a California government entity that negotiates a purchase without litigation so long as it follows California eminent domain procedures and makes "every reasonable effort to buy the land."

In addition, Superfund extends immunity to a "(s)ate or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign," so long as the entity does not cause or contribute to the contamination. 42 U.S.C. Sections 9601(20)(D) and 9601(35)(A).

New Superfund amendments (titled the "Brownfields Revitalization and Environmental Restoration Act of 2001") protect a "bona fide prospective purchaser" of a contaminated property including a municipality. 42 U.S.C. Section 9601(40) and 9607(r). The amendments provide a defense to "a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility," provided



that the purchaser satisfies identified requirements.

New Superfund case law provides an additional defense to an innocent purchaser of a contaminated property. *Carson Harbor Village v. Unocal*, 270 F.3d 863 (9th Cir. 2001), holds that "disposal" liability may not arise where pre-existing chemicals migrate through the property.

A municipality that wishes to redevelop a brownfield also may address federal liability with the EPA through administrative tools such as a prospective purchaser agreement or "comfort letter." Purchaser agreements typically require extensive site investigation, cooperation and thorough cleanup. In exchange, the EPA provides the brownfield purchaser with a covenant not to sue. A less complex method to address federal liability is a nonbinding "comfort letter," which indicates that the EPA does not presently intend to order cleanup at the site.

State Statutes and Administrative Tools

When a California municipality acquires a contaminated property, its potential liability does not begin and end with federal law. It also must consider California environmental statutes, typically enforced by the California EPA and its subagencies, the Department of Toxic Substances Control and State Water Resources Control Board.

For example, California has its own Superfund, Hazardous Waste Control Act and underground storage tank program, each of which may impose cleanup liability. In addition, the Water Code requires remediation of contamination that threatens water quality.

Notwithstanding this robust regulatory framework, California offers statutory and administrative tools to encourage redevelopment of brownfields.

The California Superfund, Health & Safety Code Section 25323.5(a)-(b), adopts many federal Superfund immunities. Thus, a municipality may be exempt from California Superfund cleanup liability where it acquires property by eminent domain or other involuntary means.

The Polanco Redevelopment Act, Health and Safety Code Section 33459 et seq., provides tailored immunity to redevelopment agencies that investigate and remediate contaminated properties in redevelopment areas. *Redevelopment Agency of San Diego v. Salvation Army*, 103 Cal.App.4th 755 (2002).

New legislation, the California Land Environmental Restoration and Reuse Act, Health & Safety Code Section 25401 et seq., gives municipalities limited immunity to investigate and remediate small brownfield sites.

Moreover, municipalities are not liable for violations of Proposition 65, Health & Safety Code Section 25249.5 et seq., or the Unfair Competition Law, Business & Professions Code Section 17200 et seq., because public entities cannot be sued under these laws.

A municipality that acquires a brownfield site also may negotiate cleanup agreements that provide liability protection with the Department of Toxic Substances Control and the water board. The Unified Agency Review Site Designation Process, Health & Safety Code Section 25260 et seq., allows designation of a single agency to oversee site investigation and remediation. A cleanup completed pursuant to its terms generally is immunized from further enforcement.

In addition, the Department of Toxic Substances Control and the water board offer voluntary cleanup programs to encourage redevelopment of brownfields. These programs allow a party undertaking cleanup to pay agency oversight costs and advance funds for remediation. When remediation is complete, which can be lengthy process, the program offers a "no further action" letter or certification of completion.

The Department of Toxic Substances Control and the water board also offer prospective purchaser agreements, which provide a covenant not to sue in exchange for a monetary payment or an agreement to conduct cleanup. These agencies also may issue nonbinding "comfort letters," which identify current enforcement posture. For less contaminated underground storage tank sites, local agencies such as the Los Angeles Fire Department may issue letters to confirm that no further remedial work is required.

California Common Law and Defenses

A California municipality that acquires a contaminated property also must consider liability for California common law "toxic tort" claims, such as trespass and negligence, brought by adjacent property owners or the public.

The California Tort Claims Act, Government Code Section 810 et seq., immunizes public entities from common law torts absent specific statutory liability. Furthermore, a municipality that acts reasonably and with due care to investigate and remediate a brownfield site may benefit from compelling equitable defenses and design immunity.

These equitable defenses were at issue in *Resolution Trust v. Rossmore*, 34 Cal.App.4th 93 (1996), where the landlord defended common law claims in a property contamination case on the ground that nothing showed its active participation in the leak. The trial court adopted this defense, holding that "[s]ome form of negligence by the landowner is required." The Court of Appeal affirmed.

These equitable defenses also apply to Tort Claims Act liability. For example, a public entity sued for a dangerous condition of public property may defend on the ground that "the act or omission that created the condition was reasonable." Government Code Section 835.4(a).

In addition, design immunity under Government Code Section 830.6 insulates discretionary planning and design decisions from review in a dangerous condition of public property lawsuit. See *Higgins v. State of Cal.*, 54 Cal.App.4th 177 (1997) (describing immunity requirements). This defense may apply where a municipality is sued in connection with a plan to investigate and remediate a contaminated property.

Tools are available to help California municipalities initiate much-needed brownfield redevelopment. A municipality that undertakes a thorough plan to investigate and remediate the property and cooperates with environmental regulators can manage its liability risk and turn brownfields green. ■

Gideon Kracov is a deputy Los Angeles city attorney in the real property and environment division.