Lawsuit sets precedent for brownfield remediation in city areas

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California's Fourth District Court of Appeal issued a landmark decision in November that could forever change how brownfield property is designated city redevelopment areas — such as downtown's East Village neighborhood — are remediated.

The court ruled that a redevelopment agency could recover its costs of cleaning up a contaminated property from the property owner, even though the agency chose not to prepare a cleanup work plan that was consistent with the National Oil and Hazardous Substances Pollution Contingency Plan, commonly called the National Contingency Plan or NCP. The architect of the appeal, Richard Oppen, special legal counsel to the Center City Development Corp., represented CDCD and the city of San Diego in the original case.

California's Palomar Redevelopment Agency was the primary piece of supportive legislation cited by the plaintiffs in the lawsuit, the Redevelopment Agency of the city of San Diego, to make its case against the Salvation Army, owners of the property in question. The Palomar Agency also was used by the court to support its decision.

The Palomar Agency was designed to assist redevelopment agencies in responding to brownfield properties in their redevelopment areas. The act allows a redevelopment agency to reclaim costs for cleanup of properties that have been designated as redevelopment areas. The court ruled that if the property owner does not cooperate, the redevelopment agency can perform the cleanup itself or arrange for the cleanup itself or arrange for the third party to perform the cleanup.

For example, the redevelopment agency can require a property owner to provide all environmental information related to the property, including Phase I assessment or subsequent environmental tests. The redevelopment agency also can perform cleanup on property owned by the agency, as well as property owned by another party.

How the case unfolded

In March 1994, the city's Redevelopment Agency retained Environmental Business Solutions, an SCE Engineering company, to work with the County Department of Environmental Health to prepare a Phase I site assessment for 26 Lots in the East Village Redevelopment Area of downtown San Diego. The redevelopment agency encompasses the property, owned by the Salvation Army, that is the subject of this litigation. Environmental Business Solutions began by researching the current and historical uses of the designated properties to assess the likelihood that a release of hazardous substances requiring remediation had occurred.

The firm identified a possible underground storage tank (UST), under the sidewalk adjacent to the Salvation Army property, as a potential pollution problem.

Environmental Business Solutions then prepared an Initial Scope of Work to address the UST and any other possible contaminations on the property. The initial scope of work included a property examination and a Phase II site assessment of the property. The investigation of hazardous materials and wastes in 1995, the agency sent a notice to the Salvation Army requesting that it retain a remedial action plan for deep parking lot in accordance with the Palomar Act. The Salvation Army did not respond to the notice.

In early 1998, Environmental Business Solutions prepared a master work plan, which was approved by the DEH, describing the cost estimate and site plan, including a risk-based corrective action approach, for the project area.

In August 1999, the DEH notified the Salvation Army of an unauthorized release of hazardous substances from a UST at the property. In September 1999, the DEH asked the Salvation Army to submit a work plan describing its activities to investigate that release.

The agency proceeded to file its lawsuit against the Salvation Army in February 2000, taking full possession of the property in May 2000. While the Salvation Army and the agency were able to settle the Eminent Domain action, the environmental cost recovery issue advanced to a full trial, which commenced June 2000.

The bottom line for this case is that the Salvation Army withheld all arguments made by the Salvation Army. The court conveyed its agreement with and support of the work conducted by the DEH and Environmental Business Solutions that brought to light the facts that defined this case. This enabled the city's Redevelopment Agency to recover its costs from the Salvation Army for cleaning up the property and establishing key precedents for a number of significant issues that need clarification.

The power of Palomar

This case is significant because it has opened the door for cities in California to pursue acquisition of brownfield properties in targeted redevelopment areas — properties that otherwise would remain contaminated and cause environmental harm due to lack of funding for cleanup. California Governor Gray Davis recently signed SB1949, which eliminates a previously existing statute that was a tax incentive to get property owners to clean up and redevelop properties that were classified as brownfields.

In order to initiate cleanup and re-occupancy of the property, the Salvation Army must pay a $1.5 million environmental bond at the beginning of the cleanup process, which is due within four years of the start of the project.

The Salvation Army cannot sell or transfer any of the property to any third party until the redevelopment work is complete. In addition, the Salvation Army is required to deed the property to the city of San Diego within 12 months of the completion of the work.

Still, this isn't the end of the story. The Salvation Army will continue to appeal the decision, and the case is likely to set new standards for the handling of brownfield properties in California.

The decision is a significant step forward for the city of San Diego and other cities throughout California. It sets a precedent for how brownfield properties are managed and remediated, and it provides a framework for other cities to follow.

For more information, please contact the California Redevelopment Association at 916-444-3900 or visit their website at www.cara.org.

Judge is president of Environmental Business Solutions, a wholly owned subsidiary of SCE Engineers.