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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 properties in 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 chooses not to prepare a cleanup work plan that is consistent with the National Oil & Hazardous Substances Pollution Contingency Plan, commonly called the National Contingency Plan or NCP. The architect of the appeal, Richard Opper, special legal counsel to the Centre City Development Corp., represented CCDC and the city of San Diego in the original case.

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

The Polanco Act was designed to assist redevelopment agencies in responding to brownfield properties in their redevelopment areas. The act allows a redevelopment agency to order parties responsible for contaminating property in a targeted redevelopment project area to perform the necessary cleanup. If the responsible party does not cooperate, the redevelopment agency can perform the cleanup itself or arrange for a third party to clean up the property.

Furthermore, the redevelopment agency can require a property owner to provide all environmental information related to the property, including Phase I site 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 1998, the city's Redevelopment Agency retained Environmental Business Solutions, an **SCS Engineers** company, to work with the County Department of Environmental Health (DEH) to prepare a Phase I site assessment for 35 blocks in the East Village Redevelopment Area of downtown San Diego. The redevelopment area encompasses the property, owned by the Salvation Army, that was 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 there. The firm identified a possible underground storage tank (UST), under the sidewalk adjacent to the Salvation Army's property, as a potential pollution problem.

Environmental Business Solutions then prepared an Initial Scope of Work to address the UST and any other possible contamination on the property. The Initial Scope of Work included a comprehensive site reconnaissance and a Phase II site assessment of the property involving the investigation of hazardous materials and wastes.

In September 1998, the agency sent a notice to the Salvation Army requesting that it submit a proposed remedial action plan for the property within a 60-day time limit in accordance with the Polanco Act. The Salvation Army did not respond to the notice.

In early 1999, Environmental Business Solutions prepared a master work plan, which was approved by the DEH, describing an overall assessment and remedial 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 2001.

The bottom line for this case is that the Polanco Act withstood 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 needed clarification.

The power of Polanco

This case is significant because it has opened the door for cities across California to pursue remediation of brownfield properties in targeted redevelopment areas — properties that otherwise would remain contaminated and unused due to lack of funding for cleanup. California Gov. Gray Davis recently signed SB1684, which eliminates a previously existing sunset date on the cost recovery provisions of the Polanco Act. Last year, Davis signed SB32, which gives local agencies other than redevelopment agencies the authority to initiate cleanups and to recover cost actions (similar to those of the Polanco Act) from responsible parties.

One related brownfield remediation project made possible through the Polanco Act was "A Clean Footprint," the environmental remediation of the seven-block footprint of the new ballpark. Environmental Business Solutions was retained by CCDC to be the project's chief remediation consultant.

Project work for A Clean Footprint entailed performing historical and regulatory research of the 35-block portion of the East Village Redevelopment area, which encompasses the property previously owned by the Salvation Army, the seven-block ballpark footprint and all the properties within the 26-block ballpark neighborhood.

Contamination stemming from a history of commercial and industrial uses dating back to the 1800s was discovered through Phase I and Phase II site investigations. More than 100 USTs were documented.

A Clean Footprint, which was completed May 2000, is part of a $1 billion redevelopment effort to revitalize the East Village neighborhood, making it the largest project of its kind ever conducted in California. Funding for the project was obtained in part through the application of the Polanco Act, which mandated that the owners of the contaminated properties within the designated redevelopment area be held responsible for cleanup costs.

A Clean Footprint recently received an Alonzo Award by the Downtown San Diego Partnership for contributing to the revitalization of downtown San Diego. The project also was honored with the 2002 Award of Excellence by the California Redevelopment Association, the largest association of redevelopment agencies in California.

Johnson is president of Environmental Business Solutions, a wholly owned subsidiary of SCS Engineers.