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ARTICLE

REDEVELOPING REDEVELOPMENT: RECENT LEGISLATION

By Basil ("Bill") Shiber*

1. THE RISE AND (UNINTENDED) FALL OF REDEVELOPMENT IN CALIFORNIA.

The rise and fall of redevelopment agencies in California has been extensively written about, including in this publication.[1] The history of redevelopment will not be repeated here, other than to state that since the adoption of the Community Redevelopment Act ("CRA") in 1951[2] redevelopment has been a driving force in remaking the urban landscape of many communities in California.

As most people now know, by 2010 Governor Brown had made it a priority to shift tax increment[3] funds previously allocated to redevelopment agencies, and which would typically remain under local control, to state functions such as education. The state is constitutionally mandated to make sure children throughout California receive a basic level of funding for their education,[4] and given the budget deficits of the last

* Basil (Bill) Shiber is a shareholder with Miller Starr Regalia and has over 20 years' experience in the area of land use redevelopment and eminent domain, representing both private and public entities. He is author of the "Inverse Condemnation" and co-author of the "Eminent Domain" and "Community Redevelopment" chapters of Miller & Starr, *California Real Estate* 3d. He can be reached at 925-935-9400; basil.shiber@msrlegal.com.

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decade, available funds were scarce. Tax increment funds in the coffers of redevelopment agencies were an inviting target, and the state viewed those funds as a way to satisfy unfunded state mandates. The redevelopment agencies resisted, of course, and in 2010 sponsored a successful statewide proposition (Proposition 22) amending the California Constitution to preclude such a money grab.[5]

In June 2011, the Legislature adopted trailer bills to the budget that it thought would cleverly achieve the objective of making tax increment available to the state, without violating Proposition 22. The legislation would dissolve redevelopment agencies (Assembly Bill 1X 26),[6] but allow agencies to avoid dissolution by "opting in" to contribute their proportionate share of tax increment sufficient to generate $1.7 billion (in 2012) to be applied toward the budget deficit. (Assembly Bill 1X 27.)[7]

The redevelopment agencies did not like being put to this dilemma, and took the state to court, arguing both bills were unconstitutional. What happened next was probably unexpected and unintended by all sides. The California Supreme Court held in an opinion issued December 31, 2011 that the Assembly bill dissolving redevelopment agencies (1X 26) was constitutional, but the "lifeline" bill that would allow continued operation contingent on reallocation of tax increment (1X 27), violated Proposition 22, and was unconstitutional.[8] Redevelopment as we knew it since the 1950's was effectively dead.

The two years since the dissolution of redevelopment agencies have seen a flurry of activity, primarily aimed at winding up the activities and interests of redevelopment agencies in a coherent and orderly fashion. That effort has resulted in new statutes, such as AB 1484 passed in June 2012,[9] which clarifies the process for disposition and use of real property belonging to former redevelopment agencies. At the same time, there have been various proposals to resurrect redevelopment, but leaner and better. Most of those efforts have been vetoed by the Governor, who has made clear his intention that redevelopment be completely dismantled before the job of reconstruction begins.[10]

In the last year, however, there have been some positive signs for redevelopment. Several pieces of legislation bringing back some of what was lost with the demise of redevelopment have been passed by the Legislature and immediately signed by the Governor. Both provide local agencies—cities and counties—with tools previously available to redevelopment agencies. We will discuss them below.

2. ASSEMBLY BILL 440 – SON OF THE POLANCO ACT.

a. The Polanco Act – As It Used To Be.

One of the most powerful tools that redevelopment agencies had in their tool box was the Polanco Redevelopment Act.[11] The Polanco Act allowed redevelopment agencies to initiate and pursue a site investigation and remediation process with respect to contaminated property within a redevelopment project area, with oversight by the appropriate regulatory agency. Once the cleanup was complete, the Act conferred immunities on the redevelopment agency, and subsequent developers and lenders, to encourage development of the site.[12] In addition to the availability of tax increment funding, the Polanco Act also had a provision for recovery of costs and expenses related to the investigation and cleanup, including, in some instances, recovery of attorney's fees.[13]

This process had the salutary effect of giving redevelopment agencies the ability to clean up and reuse property within areas of blight, where private enterprise on its own would or could not. Redevelopment agencies were able to utilize tax increment funds for the costs of cleanup, and seek cost recovery from responsible parties, including property owners. In exchange, property within redevelopment project areas became available for redevelopment, generating jobs and tax revenue, and eliminating blight.

There were also problems with the Polanco Act, which reflected the problems with redevelopment as a whole. Some attorneys and consultants built a "cottage industry" around Polanco Act clean-up work by aggressive—and sometimes unproductive—use of the mechanisms set forth in the Polanco Act. The financing of remediation efforts with tax increment funds made Polanco Act actions a low risk, high benefit proposition for agencies and their consultants. Taxpayers ended up paying, regardless of the wisdom or outcome of the project, and regardless of the extent of cost-recovery from responsible parties. When redevelopment agencies were dissolved in February 2012, the Polanco Act legislation was effectively turned off, a victim of collateral damage.

b. AB 440 – The Successor Act.

AB 440, signed by Governor Brown in 2013,[14] describes itself as "the policy successor to the Polanco Redevelopment Act."[15] The new legislation provides that the case law developed in connection with the prior Polanco Act applies in the interpretation of this new statute, further anchoring itself to the prior law.[16]

The new legislation authorizes a "local agency" to obtain non-privileged environmental assessment information for all sites in its "jurisdictional boundaries."[17] "Local agency" includes every city and county in the state, which means that this new Act applies to all property within the state, as opposed to being limited to property within redevelopment project areas as the Polanco Act was.[18] A local agency may direct a property owner to complete a Phase I and Phase II environmental assessment for the contaminated property.[19] If the owner fails to undertake this analysis, the city or county may, on reasonable notice, enter the property and undertake the investigation.[20]

The city or county may initiate a cleanup process by giving responsible parties a 60-day notice to prepare an investigation and cleanup plan prepared by a qualified independent contractor.[21] As with the prior law, the cleanup process is coordinated with the appropriate regulatory agencies.[22] AB 440 also includes a more extensive provision for public participation in the cleanup process, allowing for public input and vetting of proposals.[23]

Because the new Act applies to all property within the state—and not just property located within a redevelopment project area as was the case previously—the Legislature has restricted application of the Act to "blighted property" that is "in a blighted area."[24] Thus, a local agency may "investigate or clean up a release [of contamination] on, under or from blighted property that the local agency has found to be within a blighted area within the local agency's boundaries … whether the local agency owns that property or not."[25]

The statutory definition of blight in the new legislation mirrors prior definitions within the community Redevelopment Law, and significantly, also requires that a connection be made between the presence or release of hazardous material and the existence of the blight conditions.[26] In other words, the local agency must demonstrate that the contamination contributes to the conditions of blight. This eliminates unnecessary, taxpayer-funded cleanup of property with background levels of contamination that do not as a practical matter prevent or impede the redevelopment likely to occur on the site.[27] While it may be possible to use historical records relating to redevelopment project areas to support some of these blight findings, it is clear that the Legislature intends that the use of this Act be limited to property in which the presence or release of hazardous material has actually contributed to the blight conditions.

AB 440 provides for certain cost recovery mechanisms and sets forth a statement of legislative intent "that local agencies diligently pursue reimbursement for investigation and cleanup costs incurred pursuant to this chapter."[28] A responsible party may avoid liability by establishing bona fide prospective purchaser status, a release due to the acts or omissions of a third party, an act of God, or an act of war.[29]

There is a significant difference between the Polanco Act and its successor in terms of funding. As noted above, cost recovery from responsible parties is still available. However, tax increment funding is no longer available to fund the cleanup efforts, which means legal and consultant fees, as well as cleanup costs, must be recovered from responsible parties. This absence of a tax increment piggy-bank may cause local agencies and their lawyers to more carefully consider the costs and potential benefits before embarking on a remediation effort.

In sum, this new legislation provides local agencies with the tools to clean up properties when the presence of contamination results in their non-use or underuse, but will likely elicit a more careful evaluation of costs and anticipated benefits, given the absence of tax increment funding. This may in turn avoid some of the excesses of the past.

3. SB 470 – WE STILL REALLY LIKE ECONOMIC DEVELOPMENT.

SB 470[30] is short, but significant. It recognizes that "with the loss of redevelopment funds, cities, counties and cities and counties need to continue certain powers afforded to redevelopment agencies that were critical to economic development, yet do not have an impact on schools or the state budget."[31] It declares it to be state policy that "the creation of economic opportunity and the provisions for appropriate continuing land use and construction policies with respect to property acquired, in whole or in part, for economic opportunity constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interest of health, safety, and welfare of the people of the state and cities and counties."[32] In other words, local agencies can spend public funds and resources to promote economic redevelopment.

This legislation allows a city or county to sell or lease property returned to it pursuant to an approved long range property management plan[33] for purposes of economic development. This includes selling or leasing the property for less than what would otherwise be fair market

value when there are identifiable economic opportunities created by the sale such as creation of jobs and generation of tax revenue.[34] Any such sale or lease must be approved by the city or county by resolution after public hearing.[35] These provisions largely replicate the process under former law for sale of property acquired with tax increment funds.[36]

There must be a determination of the estimated value of the interest to be conveyed or leased and, to the extent that the sale price or rent is less than the fair market value, an explanation of that differential and an explanation of how the sale or lease will assist in the creation of economic opportunity. The resolution must include one of the following findings by the adopting board or council: either the consideration "is not less than the fair market value at its highest and best use;" or the consideration is "not less than the fair reuse value at the use and with the covenants and conditions and development costs authorized by the sale or lease."[37] Thus, the city or county can sell property subject to restrictions and covenants that may reduce immediate sale or lease proceeds, but will otherwise enhance local economic opportunities. For example, a city can impose a condition or requirement on the use of property to be sold (such as making it available for public parking to assist in the revitalization of surrounding businesses), and adjust the sale price based on those restrictions and conditions.

The statute expressly states that it does not authorize the use of eminent domain for economic development purposes,[38] thereby avoiding one of the most controversial aspects of prior redevelopment law—the use of eminent domain for economic development.

4. CONCLUSION.

Public entities will undoubtedly need more tools than those provided by the new legislation summarized above in order to coherently plan and implement economic and physical redevelopment of blighted areas. It is unlikely that those tools will be provided in a comprehensive regulatory scheme, like the former CRA, at least for the foreseeable future. Help is more likely to come in bite-sized pieces, more easily digested by the Legislature, Governor, and public. By reiterating state policy to promote economic redevelopment, allowing the lease and sale of real property for that purpose, and providing tools for the remediation of property which is under-utilized due to contamination, the legislature (and Governor) have identified the need, and that is a first step.

NOTES

1. See, for example, "Update: Sifting Through the Ashes: The Demise of Redevelopment Agencies and the Scramble to Figure Out the Next Step," Brian Shaffer, Miller & Starr, Real Estate Newsalert, Volume 23, No. 1, July 2012.
2. Health & Saf. Code, §§33000 et seq.
3. Tax increment funds represent the growth in property tax revenue from areas within identified project areas. See, e.g., Cal. Const. Art. XVI, §16; Health & Saf. Code, §33670.
4. *Serrano v. Priest*, 5 Cal. 3d 584, 608-608, 96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187 (1971).
5. Proposition 22, approved by the voters November 2, 2010, adding, inter alia, §25.5 subd. (a)(7) to Article XIII of the State Constitution, and precluding the transfer of tax increment funds to or for the benefit of the state.
6. Stats. 2011, Ch. 5.
7. Stats. 2011, Ch. 6.
8. *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 242, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011).
9. Stats. 2012, Ch. 26.
10. See, e.g., Los Angeles Times, Sept. 29, 2012, "Gov. Jerry Brown Vetoes Replacement for Redevelopment Agencies."
11. See, Health & Saf. Code, §33459.01.
12. Health & Saf. Code, §33459.3.
13. See, for example, *Redevelopment Agency v. Salvation Army*, 103 Cal. App. 4th 755, 765, 127 Cal. Rptr. 2d 30 (4th Dist. 2002).
14. Stats. 2013, Ch. 588, adding Health & Saf. Code, §§25403 to 25403.8.
15. Health & Saf. Code, §25403.8.
16. Health & Saf. Code, §25403.8.
17. Health & Saf. Code, §25403.1, subd. (f)(1).
18. Health & Saf. Code, §25403(l).
19. Health & Saf. Code, §25403.1, subd. (f).
20. Health & Saf. Code, §25403, subd. (f)(2). The extent to which such entry and investigations may be undertaken absent a full-fledged "eminent domain proceeding," consistent with constitutional protections, is unclear following the recent decision of the Third District Court of Appeal in *Property Reserve, Inc. v. Superior Court*, 224 Cal. App. 4th 828, 168 Cal. Rptr. 3d 869 (3d Dist. 2014). See Miller Starr Regalia May 14, 2014 Legal Update: "Government Precondemnation Entry and Inspection—A Review of Property Reserve v. Superior Court (2014)." www.msrlegal.com/article/legal-update-government-precondemnation-entry-and-inspection-a-review-of-property-reserve-inc-v-superior-court-2014.
21. Health & Saf. Code, §§25403.1, subd. (a)(2)(B), 25403.1, subd. (b)(2)(A).
22. Health & Saf. Code, §25403.1, subd. (e).
23. Health & Saf. Code, §25403.7.
24. Health & Saf. Code, §25403, subds. (a), (b).
25. Health & Saf. Code, §25403.1, subd. (a)(1)(A).
26. Health & Saf. Code, §25403, subds. (a), (b).
27. For example, remediation of property to levels required for a residential backyard, when a commercial use over concrete slab—as to which higher background levels of contamination may be acceptable—is the feasible and likely use.
28. Health & Saf. Code, §25403.5, subd. (c).
29. Health & Saf. Code, §25403.5, subd. (b).
30. Stats. 2013, Ch. 659 adding Gov. Code, §§52200 to 52203.
31. Health & Saf. Code, §52200, subd. (c).
32. Health & Saf. Code, §52200.4, subd. (c).

33. Health & Saf. Code, §34191.5.
34. Health & Saf. Code, §52201, subd. (a)(2)(B)(iv).
35. Health & Saf. Code, §52201, subd. (a)(1).
36. See former Health & Saf. Code, §33433.
37. Health & Saf. Code, §52201, subd. (b).
38. Health & Saf. Code, §52200.6.

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