

MEDIATION: THE MOST EFFECTIVE WAY TO RESOLVE A POLANCO ACT LAWSUIT

Written for Redevelopment: Building a Better Community

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At the risk of being accused of “preaching to the choir”---the work of any California Redevelopment Agency is important. Important to the citizens of the City in which it works and important to all of the people of California. Those working in the field must be congratulated for your vision, your energy and your passionate commitment to bettering our cities.

To better enable and further the great work of Redevelopment Agencies across California, in 1990 the legislature enacted Health and Safety Code sections 33459—33459.8---sometime referred to as The Polanco Redevelopment Act¹. It has been said: “The Polanco Redevelopment Act confers unusual powers on redevelopment agencies. It is the most powerful tool agencies have available to address California’s brownfields.”² At the heart of Polanco’s power is the *right to compel* errant contaminators to pay the costs incurred by the Agency in remediating (cleaning up) a toxic site. The Agency’s costs can be high and the potential contributors (“responsible parties”) recalcitrant in paying.³ If responsible parties drag their feet in paying the Agency’s costs---*and they most likely will*---it (the Agency) may file a Superior Court lawsuit naming all responsible parties as defendants and “may recover any costs incurred to develop and implement a cleanup or remedial action plan...” (Section 33459.4)⁴

The purpose of this article is to suggest ways the Agency may recover its costs without the necessity and expenditure of value time and energy through the often long, drawn out, and often problematic, litigation process. In short, suits against responsible parties should be settled where possible.

Mediation is the alternative forum of choice to the courtroom. Effective mediation can often quickly resolve the dispute without the Agency or responsible party spending

¹ All references to “the Act” or statutory citations are to the Health and Safety Code.

² See:” The Polanco Redevelopment Act: California’s Most Important Brownsfield Statute” by William D. Brown and Audrey Winters, September 2003, Real Property Reporter CEB.

³ The Act empowers the Agency to “...take *any actions* that the agency determines are necessary and that are 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 the agency owns that property or not, subject to the conditions specified in subdivision (b).” (emphasis added)

⁴ Court decisions have held liability is “strict” and is “joint and several” among all responsible parties. A powerful tool indeed.

hundreds of thousands of valuable dollars in legal fees---that may or may not be recovered.

One reason Polanco⁵ suits should be settled is because they are often fraught with highly complex legal and factual questions. While an Agency may see its right to recovery as “dead bang” or “black and white”, complex legal and factual issues change the color of the evidence and the arguments from black and white to mushy gray. The result in the courtroom can be problematic---despite the arguable intent of the drafters of the Act that it be easy. Issues such as: who is a “responsible party”; whether there was a “release” during a certain relevant time window of ownership; was the requisite 60 day notice given and did a responsible party respond in time with an adequate remedial action plan; were the clean up costs expended by the Agency reasonable and necessary? Each of these questions must be answered in the course of litigation and each presents a fruitful area of controversy for a creative lawyer.

Mediation is the answer!

Mediation is a process where the parties meet in the spirit of compromise with an experienced neutral in a negotiation. Often the dispute can be resolved and settled in one or two days---much better than months or years of litigation.

The key to the success of any mediation is: (1) selecting the right mediator; (2) a willingness to compromise; (3) willingness to “get real.” Each ingredient is critical.

Select a mediator with a proven track record of successfully resolving complex disputes. In successful Polanco mediations engage a mediator with knowledge of the legal issues and controlling case authority. You want a mediator who is knowledgeable in the law, creative, tenacious and tirelessly energetic. Get the best mediator you can find! Often the better the mediator the more expensive...But, the old adage of “you get what you pay for” still applies.

All parties must come to the table willing to compromise. Reason: mediation is a voluntary process requiring a “yes” from all participants to settle. Because of its voluntary nature, each side must persuade the other side to say yes---compromise is the most effective tool in getting to yes. Next, each side must be willing to be realistic---to “get real.” This means always being willing to test an argument made in mediation against how that same argument will be received by a judge or jury in court. In my mediations I am often heard telling the parties to “get real.” “Sooner or later the judicial system forces everyone to get real. If that’s true, then why not today!”

⁵An analogous federal statute is CERCLA. “CERCLA” is 42 USC 9607 et. seq. commonly known as the Comprehensive Environmental Response, Compensation and Liability Act---hence CERCLA. CERCLA was enacted to ‘initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.’ See United States v. Northeastern Pharmaceutical (8th Cir. 1986) 810 F.2d 726. “The elements of a cause of action for cost recovery under the Polanco Act differ from those for a cost recovery action under CERCLA.” See Redevelopment Agency of San Diego v. Salvation Army (2002) 103 Cal. App.4th 755, 764.

You may wonder why a mediator is needed if everyone is prepared to compromise and prepared to “get real?” There are many reasons a mediator is *required*. Trying to settle a case, on the telephone or even in person, with your opposing responsible party just *doesn't work*. The guiding hand and persuasive personality of an experienced neutral is sine-qua-non to any successful settlement. You have probably already tried informal negotiations and have been unsuccessful.

In summary: mediating a Polanco claim is by far the best way to resolve a toxic clean-up reimbursement dispute between a Redevelopment agency and a “responsible party”. The legal and factual issues in dispute are many. The guiding hand of an excellent, experienced neutral, one with sophisticated knowledge of the controlling court decisions and statutes is crucial to settlement. But, you’ll find if you try this approach, a settlement will most often be achieved in a very shorter period of time---compared to years of litigation---and at far less expense in both money and your Agency’s precious resources.⁶

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⁶ In a subsequent article, given sufficient interest, I will address some of the interesting legal issues, associated with bringing a Polanco claim---such as who is a responsible party, especially applying the Water Code definition, how the courts define a toxic “release”, joint and several liability and other legal and tactical questions.