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The Demise of Redevelopment Agencies in California: Challenges Ahead for Brownfields Remediation

*Emily M. Erdman**

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I. Introduction

In the wake of the recent dissolution of redevelopment agencies in California, communities across the state have lost one of their strongest tools for cleaning up potentially productive properties deemed too contaminated to develop without environmental remediation. The reuse of properties contaminated with hazardous substances, known in the industry as “brownfields,” generates a plethora of community benefits, including accelerated economic growth, improved public health and lessened environmental risks from latent industrial pollutants and wastes. Despite these benefits, public and private entities alike have been historically unwilling to take on the often onerous financial and legal risks of cleaning up these areas in line with strict federal and state environmental regulatory

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requirements. In response, California redevelopment agencies (“RDAs”) stepped in during the past few decades and became largely responsible for the accelerating remediation of many of these brownfields sites, engendering the economic and legal viability of many brownfields development projects.

Despite these benefits, in 2012 California Governor Jerry Brown ultimately succeeded in dissolving all RDAs as part of a statewide emergency budget deficit plan.¹ Though the plan ultimately led to an influx of millions of dollars in additional tax revenue for the state, the accompanying dissolution of RDAs left many in local communities wondering, “What next?” Though a number of recent legislative efforts have attempted to solve, or at least improve, the legal and financial issues created by the sudden dissolution of RDAs, many hurdles remain. Stakeholders in brownfields development continue to face a number of impediments, and legislation has thus far failed to provide adequate remedies. The future of brownfields projects likely requires renewed endeavors by partners in these projects, and a reshaping of the field in a world without RDAs.

II. Brownfields Development

As an environmental and land use planning label, the term “brownfields” has quickly gained currency the past 20 years as a popular buzzword in urban development. The U.S. Environmental Protection Agency (“EPA”) officially defines brownfields 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.”² These properties are frequently the prior sites of industrial factories and waste disposal plants, and often take up prime real estate. Some estimates show over 450,000 brownfields sites existing in the U.S.³ Of these brownfields, the EPA estimates that over 90,000 lay idle in the state of California alone, while some private researchers estimate upwards of 117,000 such brownfields sites in the state.⁴ As populations swell across the

1. CAL. DEP’T OF FIN., *Redevelopment Agency Dissolution*, (Dec. 3, 2013), <http://www.dof.ca.gov/redevelopment>.

2. *Brownfields*, U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, <http://epa.gov/brownfields> (last visited Feb. 20, 2014).

3. *Basic Information*, U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, http://epa.gov/brownfields/basic_info.htm#plan.

4. *Brownfields Home Page*, CAL. ENVTL. PROT. AGENCY, <http://www.calepa.ca.gov/brownfields/>; Corynn Brodsky, *How Many Brownfields Does California Have?*, CENTER FOR CREATIVE LAND RECYCLING (2007), available at <http://www.cclr.org/media/publications/How%20Many%20Brownfields%20Does%20California%20Have.pdf>.

nation, especially in dense city spaces, urban infill continues to gain in popularity as an attractive, and perhaps necessary, means of redevelopment.⁵ Government agencies and private developers alike look to redevelop unused properties within city boundaries, rather than disturb more pristine undeveloped properties and greenspaces.⁶

A. The Benefits of Brownfields Development

By cleaning up contaminated sites so that the property can be productively used, many brownfield redevelopment projects, whether public, private, or both, have positively affected surrounding communities' economic growth, social and neighborhood revitalization efforts, and environmental restoration. The vast majority of brownfields sites have negative residual land values before clean up efforts.^{7,8} However, once restored, brownfields contribute tax revenue to the state, as well as income tax, business tax and utility tax revenues.⁹ The EPA estimates that each dollar of public funds invested in brownfields development leverages at least \$2.50 in private investment, and that every acre of brownfields cleaned and reused saves four and a half acres of open and undeveloped space, i.e., space that has no buildings and is often accessible to the public.¹⁰

Further, such projects have a number of more localized benefits. They not only stimulate local job growth both during and after completion of the remediation, but often increase the property values of surrounding homes.¹¹ In addition, brownfields redevelopment has social benefits as well, turning community eyesores into attractive hubs and encouraging the general holistic health of neighborhoods.¹²

5. Henry Mayer & Michael Greenberg, *Coming Back from Economic Despair: Case Studies of Small- and Medium-Size American Cities*, 20 *ECONOMIC DEVELOPMENT QUARTERLY* 232 (2001).

6. *Id.*

7. *Brownfields Program Achievements Linked to Early Success*, U.S. ENVTL. PROT. AGENCY (Oct. 2006), <http://nepis.epa.gov/Adobe/PDF/P100829D.pdf>.

8. GROUP MCKENZIE, *Brownfield/Greenfield Development Cost Comparison Study* (2004), available at http://www.portofportland.com/PDFPOP/Trade_Trans_Studies_Brnfld_Stdy_Exec_Smry.pdf.

9. *Id.*

10. U.S. ENVTL. PROT. AGENCY, *supra* note 7.

11. Corrin J. Breeding, *Socio-Economic Revitalization Through Brownfield Reclamation* (2012) (Unpublished Master's thesis, University of Tennessee), available at http://trace.tennessee.edu/cgi/viewcontent.cgi?article=2486&context=utk_gradthes.

12. *Id.*

Finally, brownfields redevelopment may have unique, benefits for California's future energy production. The EPA believes that many brownfields locations may serve as useful sites for new renewable energy projects, and recently created an online tool through which public and private developers may search for contaminated sites in California that are potential candidates for such renewable energy development.¹³ The EPA also recently launched the "RE-Powering America's Lands" initiative to encourage such renewable energy development on contaminated land sites throughout the United States.¹⁴

B. Economic and Legal Challenges

Despite the large potential benefits of brownfields reuse, both the costs associated with the identification and cleanup procedures at such sites and the potential liability associated with ownership and/or involvement with these properties present large hurdles to this kind of development. These costs include the price of construction and remediation and a higher risk premium, which affects the price of contracting insurance for the site.¹⁵ As a result of the high cost and potential legal liability of brownfields reuse, many private developers are hesitant to develop such spaces.¹⁶ Among developers, a common belief persists that undeveloped greenspace and uncontaminated areas remain easier and more lucrative to develop, despite their sizable distances from population centers and attached to an altogether different set of extraneous costs.¹⁷ A number of complementary federal and state statutes present significant legal hurdles to brownfields remediation as well. Federal environmental law, most notably the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), passed by Congress in 1980 to address serious environmental concerns with the improper disposal of hazardous substances at sites throughout the country, puts various constraints on brownfields development.¹⁸ CERCLA expanded the federal government's ability to appropriately identify and investigate hazardous waste releases at some of the most contaminated sites in the

13. *Renewable Energy on Contaminated Lands in California*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region9/climatechange/renewcontlands>.

14. *Siting Renewable Energy on Potentially Contaminated Land and Mine Sites*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oswercpa>.

15. GROUP MCKENZIE, *supra* note 8.

16. *Id.*

17. *Id.*

18. See CERCLA Overview, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/policy/cercla.htm>.

country, and thus better remediate contaminants endangering the environment and the public's health.¹⁹ Towards this end, CERCLA created a three-pronged approach to hazardous waste cleanup that: (1) enacted substantive law concerning abandoned hazardous waste sites; (2) established a trust fund, funded primarily by taxing the oil and chemical industries, providing for cleanup when no responsible party could be found; and (3) established liability for those ultimately responsible for the release and transport of such hazardous waste.²⁰ While the law predominantly focuses on the most contaminated areas, otherwise known as Superfund sites, CERCLA's substantive provisions also apply to brownfields.²¹

CERCLA's third prong establishes strict liability for those responsible for the release and disposal of hazardous substances into the environment by persons and businesses deemed "potentially responsible parties" ("PRPs").²² This liability encompasses owners and operators of the property, any person who owned the facility at which such substances were disposed, any person who arranged for the disposal of the hazardous substances, and/or any person who transported such substances for disposal.²³ The government may hold any of the above parties strictly liable for all costs of removal incurred by both federal and state governments, as well as collecting damages for the destruction of natural resources and costs of health assessments.²⁴

C. Federal Policies

As enacted, CERCLA admittedly discouraged the private development of brownfield sites because of the potential imposition of strict liability for environmental contamination.²⁵ As PRPs, many property owners and developers feared undertaking the high risks of developing brownfields sites, since they could be held financially responsible for both cleanup costs and damages. In response, many owners left sites idle rather than redevelop

19. *Id.*

20. *Id.*

21. INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, BROWNFIELDS REDEVELOPMENT: A GUIDEBOOK FOR LOCAL GOVERNMENTS AND COMMUNITIES (2d ed. 2001), available at http://www.usmayors.org/brownfields/library/Brownfields_Redevelopment.pdf.

22. See 42 U.S.C. § 9607 (2014).

23. *Id.*

24. *Id.*

25. Steven M. Sommers & Michelle C. Kales, *Acquiring and Disposing of Environmentally Contaminated Property*, Colo. Law., March 2005, at 11.

their properties and thus open themselves up to liability for cleanup costs.²⁶ Noticing this, agency decisionmakers quickly took various steps to encourage brownfields development despite the liabilities imposed by CERCLA.

The EPA took a large step towards developing brownfields in 1995 with the creation of the “Brownfields Program” dedicated solely to the remediation and development of such sites.²⁷ The program encouraged the “sustainab[le] reuse” of former brownfields sites, with peripheral goals of adding tax revenue and job growth in addition to the more typical goals of improving human health and environment at such sites.²⁸ The EPA has declared that its goals in brownfields development include protecting the environment, reducing blight, and steering development away from greenfields and working lands.²⁹ Since 1995, the EPA estimates that the Brownfields Program has leveraged more than \$14 billion in brownfields cleanup and redevelopment funding from the private and public sectors and over 60,000 jobs.³⁰

In more recent attempts to alleviate CERCLA’s negative effects on brownfields development, Congress passed the Small Business Liability Relief and Brownfield Revitalization Act of 2002 (“Federal Brownfields Amendments”).³¹ The Federal Brownfields Amendments sought to protect small businesses looking to develop brownfields from potential liability under CERCLA.³² The Act protects any purchaser of a brownfields site from federal liability for cleanup costs when it qualifies as a “Bona Fide Prospective Purchaser” (“BFPP”), thus encouraging such purchasers to buy brownfields properties.³³ To qualify as a BFPP, however, the law imposes a number of significant hurdles, and a potential developer must have:

- (1) purchased the property after January 1, 2002;
- (2) purchased a property at which all disposal of hazardous waste occurred before such an acquisition;

26. Flannery P. Collins, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL’Y F. 303, 311 (2003).

27. Brodsky, *supra* note 5.

28. U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 3.

29. *Brownfields*, U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, <http://epa.gov/brownfields>.

30. U.S. ENVTL. PROT. AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 3.

31. 42 U.S.C.A. § 9628 (West 2014).

32. *Id.*

33. *Id.*

- (3) made all necessary and appropriate inquiries into any prior owners of the brownfield site, in accordance with accepted commercial and customary standards;
- (4) gave all legally required notices with respect to hazardous substances on the property
- (5) acted with appropriate care with respect to these substances by taking steps to stop any continuing release; prevent future releases; and prevent exposure to such released substances;
- (6) given full cooperation, assistance and access to the property by federal and/or state agencies;
- (7) complied with any land use or institutional controls concerning the property;
- (8) complied with any administrative subpoenas; and
- (9) shown him or herself unaffiliated with any other person potentially liable for costs of hazardous waste cleanup at the site, whether through familial or contractual relationships.³⁴

The Federal Brownfields Amendments provides additional protections to properties remediated pursuant to a voluntary state cleanup program; these kinds of sites are exempted to a large extent from future EPA enforcement actions and also qualify for deferral of federal enforcement of CERCLA's provisions.³⁵ Private developers may assert a BFPP defense to liability for cleanup costs, though these brownfields developers do bear the burden of proof when asserting this type of defense.³⁶ For instance, developers must comply with detailed EPA regulations regarding making the acceptable "appropriate inquiries" into the previous ownership and use of the property, including making these inquiries within one year of acquisition of the property, reviewing state and local records, and gathering declarations by environmental professionals as to the current contamination of the property.³⁷

At the federal level, the EPA's Land Revitalization Initiative fully recognizes that these regulatory actions are part of a growing trend towards restoring contaminated properties for the betterment of the community at large.³⁸ The EPA created the initiative in 2003 to build on its earlier efforts

34. 42 U.S.C. § 9601(40) (2014).

35. See 42 U.S.C. § 9628(b) (2014).

36. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 746 F. Supp. 2d 692, 749 (D.S.C. 2010).

37. See 40 C.F.R. §§ 312 – 312.31 (2006).

38. ALAN BERGER, *DESIGNING THE RECLAIMED LANDSCAPE* 142 (2008).

to address the reuse of contaminated properties, and “instill a culture of land reuse” throughout the country.^{39 40}

II. History of Brownfields Development In California

As mentioned in Part I, *infra*, California is home to a large number of brownfields, tens of thousands of which lay idle. In California, the Department of Toxic Substances Control (“DTSC”) is the primary agency tasked with overseeing brownfields development.⁴¹ One of DTSC’s most potent tools for the appropriate development of environmentally hazardous sites is its ability to place limits on future uses of property based on the level of cleanup necessary at the site.⁴² Parcels of land with such title prohibitions are known as “Land Use Restricted Sites.”⁴³ This categorization encompasses many brownfields, whose titles generally have land use restrictions on them due to the presence of hazardous substances.

Acting in its more proactive capacities, DTSC has cleaned up various brownfields sites through its Site Mitigation and Brownfields Reuse Program (“SMBRP”). Typically, DTSC completes an average of 125 cleanups per year, and oversees more than 200 per year.⁴⁴ DTSC works closely with the Regional Water Quality Control Boards (“Water Boards”), whose primary function is facilitating the cleanup of hazardous substances that could adversely affect water quality.⁴⁵ However, DTSC does not receive enough funding to remediate any significant number of brownfields sites in California, evident in DTSC’s limits on grants for developers at \$200,000 cleanup grants and \$200,000 revolving loan fund grants per site to qualified entities.⁴⁶ DTSC’s internal financial failings and lack of organization compound this lack of funding; an agency audit in May 2013 revealed that DTSC had over \$185 million in unrecovered costs from responsible parties. Although the agency is now engaged in cost recovery efforts, this dollar

39. *Id.*

40. EPA’s *Land Revitalization Action Agenda*, U.S. ENVTL. PROT. AGENCY (Mar. 9, 2012), http://www.epa.gov/landrevitalization/agenda_full.htm.

41. *Hazardous Waste*, DEP’T OF TOXIC SUBSTANCES CONTROL, <http://www.dtsc.ca.gov/hazardouswaste>.

42. *Id.*

43. *Id.*

44. DEP’T OF TOXIC SUBSTANCES CONTROL, *supra* note 41.

45. U.S. ENVTL. PROT. AGENCY, BROWNFIELDS STATE REPORT REGION 9, *available at* http://www.epa.gov/swerosps/bf/state_tribal/update2011/bf_states_report_r9.pdf.

46. 2012 *Brownfields Funding Workshop*, DEP’T OF TOXIC SUBSTANCES CONTROL (May 7, 2012), www.dtsc.ca.gov/sitecleanup/brownfields/upload/bffunding_workshop_2012-2.pdf.

amount indicates the general state of affairs in the DTSC.⁴⁷ Until 2012, RDAs largely filled this void, and were responsible for the successful development of a large percentage of remediated brownfields sites in California.⁴⁸

A. The Role of the Redevelopment Agency

The California legislature established RDAs in 1945 in order to redevelop blighted areas using public funds, in turn serving compelling state interests.⁴⁹ Although no concrete definition of “blight” exists, the California Health and Safety Code includes a non-exhaustive list of the physical and economic conditions that constitute a “blighted area.”⁵⁰ These conditions include the presence of unsafe and dilapidated buildings, stagnant property values, properties contaminated by hazardous waste, and abnormally high numbers of abandoned commercial and residential buildings.⁵¹ Prior to the dissolution of RDAs in 2012, state law gave local governments authority to create RDAs in order to revitalize and redevelop these kinds of deteriorated areas.⁵² Once formed, such agencies were primarily responsible for creating redevelopment plans and providing initial funding for such plans in the hopes of attracting private investment.⁵³

The initial funding for RDAs flowed largely from tax increment funding (“TIF”), a lending model based on increasing expectations of property tax values resulting from redevelopment activities.⁵⁴ TIF stems from the value capture strategy utilized in public financing, whereby the government attempts to “capture” the increases in private land values generated by public investment.⁵⁵ These increases in value are most commonly the increased tax revenue from improved infrastructure and transit options near

47. Memorandum from Director Deborah O. Raphael to Secretary for Environmental Protection of the California Environmental Protection Agency Matt Rodriguez (May 30, 2013), available at <http://dtsc.ca.gov/upload/FISMAMay2013.pdf>.

48. INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, *supra* note 21.

49. Cal. Health & Safety Code § 33037 (West 2014).

50. Cal. Health & Safety Code § 33031 (West 2014).

51. *Id.*

52. See Cal. Health & Safety Code § 33037 (West 2014).

53. *Frequently Asked Questions About Redevelopment In California*, CALIFORNIA REDEVELOPMENT ASSOCIATION, <http://www.calredevelop.org/external/wcpages/wcwebcontent/webcontentpage.aspx?contentid=266>.

54. *Id.*

55. *Featured Topic: Value Capture*, RECONNECTING AMERICA (2013), <http://www.reconnectingamerica.org/resource-center/value-capture/>.

a land parcel or, at issue here, the tax increases from the use of remediated brownfields sites for more productive ends.⁵⁶

Under the TIF model as used in California, once a community or municipality creates a redevelopment area and/or project, the local agency immediately “freezes” property tax revenue at the base level established in that fiscal year.⁵⁷ For the life of the redevelopment project (generally limited to 50 years), the local government automatically diverts any extra property tax revenue generated above this base level to the local RDA as tax-increment revenue. Only two requirements were imposed upon this funding to RDAs: (1) that 22% of the revenue be “passed through” to other local agencies, including counties, school districts and cities; and (2) that 20% of the RDA’s revenue go to funding low- and moderate-income housing.⁵⁸ Simply put, TIF allowed for public and private investors to borrow against projected future tax revenue.⁵⁹ By 2010, RDAs in California were receiving around \$5 billion annually through TIF efforts.⁶⁰ TIF became the single largest source of funding for affordable housing projects in the state.⁶¹ As will be discussed further in Part III.B, though TIF was instrumental in brownfields and affordable housing development, it did divert various funds from other city and county agencies, such as school districts, a reality that would open these kinds of financing efforts up to intense criticism.⁶²

Through TIF and other efforts, RDAs helped facilitate brownfields development by securing funding that may not have otherwise been available and taking on the potential liabilities of environmental cleanup.⁶³ In regards to financing, RDAs consistently bore the brunt of the initial cost of brownfields development projects and assumed much of the legal risk involved with projects. The State and RDAs offered potential developers a wide range of financial help, including revolving loan funds, tax-free bonds,

56. *Id.*

57. MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, SHOULD CALIFORNIA END REDEVELOPMENT AGENCIES? (Feb. 9, 2011), *available at* http://www.lao.ca.gov/analysis/2011/realignment/redevelopment_020911.pdf.

58. *Id.* at 2.

59. RESTORING PROSPERITY, STATE POLICY PACKAGE: STATE-FACILITATED TIF TO ENCOURAGE BROWNFIELDS REDEVELOPMENT, *available at* <http://www.restoringprosperity.org/wp-content/uploads/2009/03/brownfieldtiffpackage.pdf>.

60. TAYLOR, *supra* note 57, at 7.

61. *Value Capture*, CENTER FOR HOUSING POLICY (Feb. 17, 2012), http://www.housingpolicy.org/toolbox/strategy/policies/capture_value.html?tierid=113458.

62. *Id.*

63. Leah Goldberg, *Brownfields Development After the Death of Redevelopment Agencies in California*, EPA Region 9 Brownfields Workshop (Nov. 8, 2012), *available at* http://www.epa.gov/region9/brownfields/workshop/pdf-2012/RDAs_Goldberg_11_8_12.pdf.

private debt funds and grant money.⁶⁴ A substantial percentage of this money came directly from TIF monies in RDA accounts.⁶⁵

B. The Polanco Act

Along with the substantial financial backing RDAs put towards brownfields remediation, California state law afforded special protections to these agencies. Even when adequate funding is available to purchase a brownfields site, a developer is still vulnerable to a number of potential legal liabilities, presenting an additional hurdle to development. Although various escape valves exist, for instance the liability protections codified in the relevant environmental and land use statutes, private parties still struggle to meet these laws' stringent remediation, monitoring, and reuse requirements.⁶⁶ In addition, even these protections are often criticized for their "unbalanced impact" on parties who have contributed in only minimal ways towards site contamination.⁶⁷

To further encourage brownfields development, California took a unique step by passing the Polanco Redevelopment Act ("Polanco Act") in 1990, putting it at the forefront of brownfields development.⁶⁸ Legislators passed multiple state laws such as the Polanco Act in order to ease the potential of liability on private developers, as well as to empower RDAs to better facilitate environmental site investigation and cleanup of brownfields.⁶⁹ The Polanco Act authorized RDAs to take a variety of actions to remedy the releases of hazardous substances from brownfields, including requiring third-party property owners to either clean such waste materials from their sites or pay the local RDA the entire costs of such a cleanup.⁷⁰ After some revisions, the Polanco Act took the national CERCLA liability framework and applied it to RDA's abilities to conduct local site cleanups and development projects.⁷¹ The law also authorized RDAs themselves to

64. GROUP MCKENZIE, *supra* note 8.

65. *Id.*

66. Collins, *supra* note 26, at 309.

67. *Id.*

68. Cal. Health & Safety Code §§ 33459 to 33459.8.

69. See, e.g., Cal. Health & Safety Code §§ 25395.60 to 25395.105, 33459 to 33459.8 (West 2014).

70. *Id.*

71. Richard Opper, *Eminent Domain and the Polanco Redevelopment Act*, ENVIROLAWYER, available at www.envirolawyer.com/Polanco_Power_Point.ppt.

bring civil actions against responsible polluting parties to compel the cleanup of contamination within the brownfields site.⁷²

The Act created a species of civil action claims for RDAs, allowing these agencies to take direct legal action against the most reticent polluters. The new law authorized RDAs to investigate all contaminated sites within larger redevelopment areas, and subsequently issue 60-day notices to property owners detailing hazardous waste cleanup requirements.⁷³ Property owners then had 60 days to propose a remedial action plan that would cover the cleanup. If property owners did not propose a plan, the local RDA could move ahead with its own action plan, and recoup the full costs of implementation from the responsible parties.⁷⁴

Under the Polanco Act, RDAs could also recoup attorneys' fees from the polluting parties, another highly valuable tool for brownfields development.⁷⁵ This provision was a useful instrument for RDAs, and encouraged such agencies to incur the full costs of pursuing civil actions against large polluters who may have previously been willing to spend large amounts on litigation in order to draw out the legal process.⁷⁶ The provision allowed RDAs to take on such parties and effectively remediate many brownfields sites at little cost to the state government.

In addition to relief from attorneys fees, the Polanco Act provided immunity from state and local liability to both RDAs and subsequent property purchasers, including persons whom entered into agreements with RDAs to redevelop brownfields properties and persons whom provided financing to the current or subsequent property owner.⁷⁷ This limited immunity would not extend towards any parties responsible for the release of hazardous substances from such properties.⁷⁸

The provisions of the Polanco Act also worked in tandem with eminent domain, further facilitating brownfields redevelopment. Because acquiring property for RDA projects was considered a valid public use, local courts allowed RDAs to use eminent domain to further along such property

72. Cal. Health & Safety Code § 33459.3 (West 2014); *Redevelopment Agency of City of San Diego v. San Diego Gas & Elec. Co.*, 111 Cal. App. 4th 912, 916 (2003).

73. Cal. Health & Safety Code § 33459.1 (West 2014).

74. *See id.*

75. Cal. Health & Safety Code. § 33459.4 (West 2014).

76. Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 *ECOLOGY L.Q.* 59, 103 (2003).

77. Cal. Health & Safety Code § 33459.3 (West 2014).

78. *Id.*

acquisitions.⁷⁹ However, the provision that eminent domain could only be used by RDAs in blighted areas constrained this power.⁸⁰

Since 1990, the Polanco Act has become a powerful tool for RDAs, who used the protections to aid in the clean up and restoration of blighted and toxic properties.⁸¹ The DTSC and the former California Redevelopment Agency jointly developed a prototype Environmental Oversight Agreement (“EOA”) to further cement the protections of the Polanco Act.⁸² Under the DTSC’s guidance, RDA’s were exempted from DTSC’s legal requirements for “Voluntary Cleanup Agreements” entered into with private developers; most importantly, DTSC allowed RDAs to supervise and lead brownfields cleanups without designation as a “responsible party,” thus exempting RDAs from strict liability under federal and state environmental statutes.⁸³

Many former brownfield sites in California were developed primarily through RDA actions and partnerships based on financial and legal benefits—developments that many have argued were highly successful in both remedying contaminated sites and turning delinquent properties into revitalized community spaces improving both tax revenue and quality of life.⁸⁴ A recent study on RDAs, sponsored by the California Redevelopment Agency, found numerous economic benefits flowing from RDA projects. The study concluded that RDAs generated \$40 billion in total economic activity between 2006 and 2007, have created over 300,000 part- and full-time jobs, and have increased California’s state income by \$22 billion since their creation.⁸⁵

C. Case Study: Emeryville, California

One highly-touted example of a successful RDA project is in the city of Emeryville, California, located just across the bay from San Francisco. Formerly a large vacant and contaminated area that had been highly

79. *Redevelopment Agency of Chula Vista v. Rados Bros.*, 95 Cal. App. 4th 309, 314 (2001); *see* Cal. Health & Safety Code § 33037 (West 2014).

80. *Redevelopment Agency of Chula Vista*, 95 Cal. App. 4th at 314.

81. RICHARD DOTY, COX CASTLE NICHOLSON LLP, REDEVELOPING BROWNFIELDS USING THE POLANCO ACT, *available at* http://www.coxcastle.com/images/ps_attachment/attachment109.pdf.

82. DEP’T OF TOXIC SUBSTANCES CONTROL, REDEVELOPMENT AGENCY ENVIRONMENTAL OVERSIGHT AGREEMENT, (2004), *available at* http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/SMBRP_FS_EOA.pdf.

83. *Id.*

84. INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, *supra* note 21.

85. Gallo and Koehler, *The Impact of Fiscal 2006-07 Community Redevelopment Agency Activities on the California Economy*, California Redevelopment Agency, June 2009.

industrial in nature, various Emeryville sites have since been transformed into a booming town complete with shopping mall, restaurants and high-density housing. The Polanco Act was instrumental in the RDA's acquisition of property and subsequent cleaning up of the brownfield areas in Emeryville.⁸⁶ The local RDA expended \$25 million to acquire the property and \$11 million to fully remediate the land, thus taking a \$36-million risk in developing Emeryville.⁸⁷ This is a substantial amount of money, and a risk likely too large for a single private investor.⁸⁸ Though the initial funds for remediation came directly from the local RDA, 90% of these funds were ultimately recovered through use of the Polanco Act's financial remedies.⁸⁹ As a result of the RDA's investment in brownfields sites in Emeryville, by 2002 new development had generated \$5.4 million in tax increment funding per year, over 8,400 new jobs had been created, and the total value of development was estimated at \$513 million.⁹⁰ These benefits accrued to an area that had only years before been considered "blighted," and filled with properties contributing zero or negative tax funding to the city. City officials note that such a successful project would not have come to fruition without RDAs and the protections and powers of the Polanco Act.⁹¹

IV. Post-Matosantos: the Demise of Redevelopment Agencies in California

Assembly Bill IX 26 ("AB IX 26") and the lawsuit that followed spelled the official end of RDAs in the state, despite these organizations' central role in a large number of redevelopment successes.⁹² The California Supreme Court's decision in *California Redevelopment Association, et al. v. Matosantos* completely dissolved RDAs over one year ago.⁹³ Governor Brown's proposed budget for 2011-12, including AB IX 27 and an associated bill AB IX 27,

86. Doty, *supra* note 81.

87. *Id.*

88. *Id.*

89. *Id.*

90. LIZ CONNOLLY, PUBLIC POLICY RESEARCH CENTER, BUILDING MUNICIPAL CAPACITY FOR BROWNFIELDS REDEVELOPMENT IN WELLSTON, MISSOURI AND EMERYVILLE, CALIFORNIA: A CASE STUDY (2004), available at http://pprc.umsl.edu/pprc.umsl.edu/data/connolly_occ_paper9.pdf.

91. Amber Evans & Marcus Nieback, *How We Marketed and Developed Partnerships for Reuse of Emeryville Brownfields*, EPA REGION 9 BROWNFIELDS WORKSHOP, (Nov. 8, 2012), available at http://www.epa.gov/region9/brownfields/workshop/pdf-2012/Marketed_Develop_Reuse_Nieback_11_8.pdf.

92. Cal. Redevelopment Agency Ass'n v. Matosantos, 53 Cal. 4th 231 (2011).

93. *Id.*

included the dissolution of all RDAs in the state and the redistribution of their funds to other local agencies.⁹⁴ These legislative actions came in the midst of severe cuts to higher education, social welfare programs and state agencies caused by the state budget deficit.⁹⁵ The California Supreme court decided *Matosantos* in the midst of the state budget crisis; when Governor Jerry Brown was elected in 2010, California's 2010-11 budget deficit was projected at \$26 billion.⁹⁶

These bills attempted to remedy these kinds of funding deficits by redistributing TIF revenues from RDAs to county auditor-controllers for subsequent distribution to cities, counties and school districts.⁹⁷ AB IX 26 mandated the immediate dissolution of RDAs, and AB IX 27 would have allowed cities to create alternative redevelopment agencies.⁹⁸ The proposed cuts largely sprung from a report published by the Legislative Analyst Office ("LAO") in February 2011 that detailed alleged financial problems with the redevelopment agency system.⁹⁹ The LAO study found that RDAs' share of local property taxes had grown from 2% to 12% since the agencies' inception over 60 years earlier.¹⁰⁰ As mentioned in Part II.B, *infra*, the report also found that by 2010 RDAs were receiving over \$5 billion in TIF.¹⁰¹

Opponents of AB IX 26 quickly filed for a writ of mandate triggering the *Matosantos* lawsuit.¹⁰² Plaintiffs argued that Governor Brown's proposed measures dissolving RDAs violated Proposition 22, a state Constitutional measure which limited the state's ability to require RDAs to make payments on the state's behalf for the state's benefit.¹⁰³ Voters had recently passed Proposition 22 largely through efforts by the California League of Cities, a major funder, and the law amended the Constitution so as to specifically to prevent the state from delaying the distribution of tax revenue from transportation and redevelopment, e.g., locally imposed tax revenue, even in

94. TAYLOR, *supra* note 57.

95. Adam Nagourney, *For California, a New Month, a New Deficit*, N.Y. TIMES, Jan. 10, 2013, <http://www.nytimes.com/2010/11/18/us/18calif.html>.

96. Adam Nagourney, *Back From the Fiscal Abyss, California Balances Its Budget*, N.Y. TIMES, Jan. 10, 2013, http://www.nytimes.com/2013/01/11/us/california-balances-its-budget.html?_r=0.

97. *Matosantos*, 53 Cal. 4th at 250.

98. *Id.* at 241.

99. LEGISLATIVE ANALYST'S OFFICE, *Should California End Redevelopment Agencies?*, <http://www.lao.ca.gov/laoapp/PubDetails.aspx?id=2440>.

100. *Id.*

101. *Id.*

102. *Matosantos*, 53 Cal. 4th at 252.

103. *Id.*

the midst of financial hardship.¹⁰⁴ In *Matosantos*, the California Supreme Court soundly rejected these arguments.

Ultimately, the Court held that because RDAs are “creatures of the Legislature’s exercise of its statutory power,” the Legislature can both expand and limit RDAs’ functions, including mandating their complete dissolution.¹⁰⁵ The Court began with a lengthy analysis of the history of public and municipal funding and redevelopment agencies in California.¹⁰⁶ The Court also found that no explicit provision in the California Constitution mandated RDAs’ continued existence, and no clear evidence of legislative intent demonstrated otherwise.¹⁰⁷ The Court struck the side bill AB 1X 27 law down as unconstitutional.¹⁰⁸

After the *Matosantos* ruling, AB 1X 26 was put into full force, and legislators and government officials made a number of changes to California’s Health and Safety Code in order to effectuate the dissolution of RDAs. First, the new law required that “all authority, rights, powers, duties, and obligations previously vested with the former redevelopment agencies” be immediately vested with successor agencies (“SAs”).¹⁰⁹ The law makes each newly created SA responsible for payment of all obligations entered into by its prior RDA, a procedure organized by “Recognized Obligation Payment Schedules.”¹¹⁰ Enforceable obligations include, but are not limited to: bonds, loans legally taken out by RDAs, payments required by the federal government, preexisting obligations to the state or obligations imposed by state law, court-imposed judgments against prior RDAs, and contracts necessary for the administration of SAs.¹¹¹

However, the dissolution statute bars cities and counties from classifying any agreements and arrangements between the city or county that created the RDA and the former RDA, and/or contracts between the former RDA and other public agencies to perform services outside the redevelopment area, as enforceable obligations requiring ongoing

104. Proposition 22, CALIFORNIA CHOICES (2012), <http://californiachoice.org/ballot-measures/proposition-22>.

105. *Matosantos*, 53 Cal. 4th at 256.

106. *Id.*

107. *Id.* at 260.

108. *Id.* at 264.

109. Cal. Health & Safety Code § 34173 (West 2014).

110. See MATTHEW S. GRAY ET AL., *Dissolution of Redevelopment Agencies Under AB1X 26: Wind-Down Requirements and Imminent Deadlines*, PERKINS COIE (Jan. 1, 2012), <http://www.perkinscoie.com/dissolution-of-redevelopment-agencies-under-ab1x-26--wind-down-requirements-and-imminent-deadlinesbricalifornia-redevelopment-association-cra-v-matosantos-no-s194861br-01-12-2012>.

111. Cal. Health & Safety Code § 34171 (West 2014).

payment.¹¹² Examples of non-enforceable obligations include plans, statements of intent, designations of redevelopment project areas, one-way commitments by the former RDA without any parties other than the local agency, and contracts that are too vague.¹¹³

The new law also originally required SAs to sell off all land and assets previously held by RDAs as “expeditiously” as possible and “in a manner aimed at maximizing value.”¹¹⁴ A later bill, Assembly Bill 1484 (“AB 1484”), amended the Health and Safety Code to include more direction for SAs in regards to these lands, and gave more flexibility to SAs for the continued ownership of such properties.¹¹⁵ Even so, in many respects, SAs’ collective hands are tied: although required by law to sell properties for the maximal value and in the shortest time possible, many RDAs held contaminated properties that will likely sell for next to nothing, if anything at all. If the SAs cannot sell these blighted sites, they will likely be stuck holding onto them. However, unlike the predecessor RDAs, SAs so far lack the legal protections the Polanco Act afford to RDAs to preemptively cleanup brownfields properties themselves and then recoup the costs of such cleanups from the private responsible parties. Further, if SAs cannot finish the brownfields cleanups initiated by RDAs, they are unlikely to achieve the goals of state law in generating more revenue for the state through the dissolution of RDAs. Unfortunately, AB IX 26 and its recent changes are silent on this matter.

Cities and municipalities must return all remaining funds after RDA dissolutions to the California Department of Finance for redistribution to public agencies and school districts.¹¹⁶ The California Supreme Court’s original stay of the implementation of AB IX 26 increased the amount of local funds due back to the state. While the bill itself lay dormant, cities continued to gather property tax revenues throughout the 2011-12 fiscal year, many of which the Department of Finance (“DOF”) claims were misallocated to inappropriate entities.¹¹⁷ In July 2012, the DOF forced SAs to choose to either make a complete “true up” payment, consisting of paying back the entirety of funds allegedly misappropriated during the year, or face

112. *Id.*

113. *Redevelopment Agency Dissolution Under ABx1 26*, CAL. DEP’T OF FIN., http://www.dof.ca.gov/redevelopment/RDA_dissolution_QandA/common_issues/view.php (last updated Nov. 28, 2012).

114. Cal. Health & Safety Code § 34181 (West 2014).

115. *Id.*

116. MATTHEW S. GRAY ET AL., *supra* note 110.

117. *ABx1 26 Redevelopment Agency Dissolution*, CAL. DEP’T OF FIN., http://www.dof.ca.gov/assembly_bills_26-27.

severe penalties from the state.¹¹⁸ This process has left many cities and municipalities in deep debt to the state.

Health and Safety Code section 34175(b) set February 1, 2012, as the definitive date for the transfer of RDA assets to the applicable SAs, and on January 31, 2012, all RDAs officially closed.¹¹⁹ Although state government experts had projected \$3.2-billion in General Fund savings from the dissolution of RDAs, numbers pulled from the LAO report, more recent estimates project that the state will save \$1.8 billion less than originally assumed in the 2012-13 budget, for a total of \$1.4 billion in savings.¹²⁰

V. The Question Remains – How To Redevelop Brownfields?

With the demise of RDAs came the demise of the associated benefits conferred upon them by the Polanco Act and other key legislation, leaving a clear void in public redevelopment work. The role of SAs as true successors to RDAs is still largely unsettled, including whether or not the legal liability protections afforded RDAs extend to such new agencies. A glaring question is whether the Polanco Act applies to the SAs created in the wake of defunct RDAs, or whether its protections apply only to these now-dead agencies. In addition, questions remain regarding whether SAs and cities will be unable to attract the requisite funding to both finish preexisting redevelopment projects and begin new projects, leaving brownfields sites polluted and underutilized.

A. Extending Legal Protections

The text of the Polanco Act explicitly spells out that its tools and liability protections apply only to property located in redevelopment areas—areas which were traditionally created and maintained by RDAs.¹²¹ The Act was instrumental in brownfields development in California during its 22-year existence, and its protections should not cease to exist solely due to the dissolution of RDAs. Many advocates recognize this stance, and towards this end, in 2011 State Representative Roger Hernandez introduced

118. *Id.*

119. *Goldberg, supra* note 59.

120. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, THE 2013-14 BUDGET: CALIFORNIA'S FISCAL OUTLOOK (2012), available at <http://www.lao.ca.gov/reports/2012/bud/fiscal-outlook/fiscal-outlook-2012.aspx>.

121. Kristina Lawson & Craig Moyer, *Unintended Environmental Consequences of the Demise of Redevelopment in California*, MANATT, PHELPS & PHILLIPS (April 12, 2012), <http://www.environmentalleader.com/2012/04/16/unintended-environmental-consequences-of-the-demise-of-redevelopment-in-california>.

Assembly Bill 1235, which would have extended the immunities of the Polanco Act to SAs looking to finish preexisting RDA brownfields development projects.¹²² Although the State Legislature ultimately passed the bill, by this time various political forces had transformed it from a bill concerning the Polanco Act into a bill about energy efficiency, and the legislature amended its text in August 2012 to remove any extension of the Polanco Act's protections to SAs.¹²³

In 2012 Senator Fran Pavley introduced Senate Bill 1335 to authorize SAs to retain control of brownfields sites.¹²⁴ The bill provides in relevant part that:

a successor agency may, subject to the approval of an oversight board pursuant to Section 34180, retain land of property obtained by the former redevelopment agency that is a brownfield site for the purpose of the remediation or removal of the release of hazardous substances . . . using available financing, funds obtained from a responsible party, existing state or federal grants, or any other funds at the disposal of the successor agency in order to maximize value of the asset. Upon completion of the remediation or removal of hazardous substances from the brownfield site, the successor agency shall dispose of the property pursuant to paragraph (1).¹²⁵

Throughout April and May of 2012, the Senate Environmental Quality, Governance and Finance and Appropriations Committees all passed SB 1335.¹²⁶ However, while the Senate Appropriations Committee held the bill, it became inactive on November 11, 2012.¹²⁷

Assembly Bill 1484 ("AB 1484"), passed in June of 2012, represents another recent development in the post-RDA world. The act amended state law, providing that "[a]ny existing cleanup plans and liability limits

122. AB 1235, Cal. Legislature, 2011-2012 Regular Sess. (Cal. 2012), *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml;jsessionid=937b099710861d9d8e842c2dc312?bill_id=201120120AB1235.

123. *Id.*

124. See *Post-Redevelopment Legislation Update*, LEAGUE OF CALIFORNIA CITIES (April 19, 2012), <http://www.cacities.org/Top/News/News-Articles/2012/April/Post-Redevelopment-Legislation-Update>.

125. SB 1335, Cal. Legislature, 2011-2012 Regular Sess. (Cal. 2012), *available at* <http://www.aroundthecapitol.com/billtrack/text.html?bvid=20110SB133596AMD>.

126. See SB 1335 - Redevelopment: brownfield sites, CALIFORNIA LEGISLATIVE INFORMATION, *available at* <http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml>.

127. *Id.*

authorized under the Polanco Redevelopment Act . . . [s]hall be transferred to the successor agency and may be transferred to the successor housing entity at that entity's request."¹²⁸ AB 1484 made several helpful changes to state law that are pertinent to the management and remediation of brownfields properties. AB 1484 modified AB 1x 26 to require that each SA submit a Long-Range Property Management Plan detailing the SA's inventory and planned use of the former RDA's properties.¹²⁹ Such plans must include detailed descriptions of the historic environmental contamination on the site, including the site's previous designation as a brownfield.¹³⁰

Going forward, permissible uses of properties include the retention of the property for governmental use pursuant to subdivision (a) of the Health & Safety Code section 34181, the retention of the property for future development, the sale of the property, and/or the use of the property to fulfill an enforceable obligation."¹³¹ SAs may transfer properties categorized for "government use" under section 34191.5, including properties used for governmental purposes, including roads, school buildings, parks, libraries and local agency buildings, to the appropriate public jurisdictions.¹³² Property, including brownfields sites, may be transferred from an SA to the local City if a formerly approved redevelopment plan exists.¹³³

Although this law may seem to solve the problem of limiting liability for public entities in redevelopment of brownfields, many questions remain. Section 34173(e) established that the liability of SAs "shall be limited to the extent of the total sum of property tax revenues it receives pursuant to this part and the value of assets transferred to it as a successor agency for a dissolved redevelopment agency."¹³⁴ Unfortunately, the successor city or county may not take actions that would increase in any way the size, boundaries or obligated property tax necessary for enforceable obligations authorized as of June 27, 2011.¹³⁵ Although section 34173(i) of the Health and Safety Code provides that the city and/or county may request all land use-related plans and functions of the former redevelopment agency, anything created for redevelopment purposes after June 27, 2011, is considered null under the new law.¹³⁶

128. Cal. Health & Safety Code § 34173(f) (West 2014).

129. Cal. Health & Safety Code § 34191.5 (West 2014).

130. *Id.*

131. *Id.*

132. Cal. Health & Safety Code § 34181 (West 2014).

133. Cal. Health & Safety Code § 34191 (West 2014).

134. Cal. Health & Safety Code § 34173(e) (West 2014).

135. Cal. Health & Safety Code § 34173(i) (West 2014).

136. *Id.*

These provisions allow SAs, cities and counties to continue work on preexisting redevelopment plans for brownfields, but do freeze any brownfields development essentially as it existed on June 27, 2011. SAs may not pursue new funding, nor take any actions that may increase debt. The SAs may only issue bonds under preexisting enforceable obligations carried over from the prior RDAs.¹³⁷ Moreover, it is not clear how these new provisions work with conflicting AB 1X 26 provisions such as its section 34163(b), which prohibits successor agencies of any kind from entering into new redevelopment contracts, including remediation and rehabilitation.¹³⁸

B. Alternative Funding

Even if the legal liability protections from the Polanco Act do indeed transfer to SAs, a tenuous possibility, the fact remains that little funding exists for such agencies to effectively carry out existing cleanup plans as well as to engage in useful and productive value capture strategies. Brownfields developers have historically depended largely on grants, loans and tax incentives—much of which came directly from RDAs.¹³⁹ As noted in Part III.B, *infra*, RDAs based the majority, if not all, of their brownfields redevelopment on TIF monies. Current law bans the use of TIF, and there is a real possibility that brownfield development projects will stall completely due to a severe shortage of funds. The DTSC's Revolving Loans Fund ("RLF") and the EPA's Assessment and Cleanup Grants make up the bulk of public agency funding for brownfields development, especially those development projects based on public-private partnerships and investment.¹⁴⁰ Municipalities must both pay off their debt and make up the difference in funding for future projects using creativity and a patchwork of district financing and special taxes.¹⁴¹

The DTSC RLF program provides funding of up to \$1 million to developers, businesses, schools and local governments for remediation projects.¹⁴² Funding may go to either public or private entities, so long as

137. Cal. Health & Safety Code § 34177(a) (West 2014).

138. Cal. Health & Safety Code § 34163(b) (West 2014).

139. Steve Dwyer, *California Brownfields...and the Challenges Ahead*, BROWNFIELD RENEWAL, http://www.brownfieldrenewal.com/news-california_brownfields...and_the_challenges_ahead_-208.html.

140. RINCON CONSULTANTS, *Life Without Redevelopment*, available at http://www.rinconconsultants.com/Portals/111276/docs/Life_Without_Redevelopment_Rincon_Marshall.pdf.

141. *Id.*

142. *Id.*

they meet the program eligibility requirements.¹⁴³ Unlike RDA projects based on TIF, RLF funds will not cover the typically substantial costs of pre-cleanup site assessments, thus the initial environmental assessments of brownfields required by state and federal law must be complete at the time of application for RLF.¹⁴⁴

Since 1993, DTSC has also administered the Voluntary Cleanup Program for brownfields designated as low-priority hazardous waste sites.¹⁴⁵ Under this program, DTSC enters site-specific agreements with project developers, which include for DTSC oversight of the site's environmental assessment, investigation, and remediation actions.¹⁴⁶ The program also adds a "cloak of reasonableness" to developer's actions, especially if such actions are evaluated in the judicial system.¹⁴⁷ The Voluntary Cleanup Program requires brownfields project proponents to pay all DTSC's reasonable costs for those services provided.¹⁴⁸

EPA Assessment and Clean-up Grants are another source of funding, but are unavailable to private entities.¹⁴⁹ The Clean-up Grant provides for up to \$200,000 per site to a public entity, while the Assessment Grant provides for up to \$300,000 per site, or \$1 million for a grouping of three sites.¹⁵⁰ These funds are only available to tribal, state, and local governments, as well as eligible nonprofits.¹⁵¹ The EPA also engages in a small number of free "Targeted Brownfields Assessment" for eligible public and nonprofit entities.¹⁵² However, to qualify for EPA funds, the applicant public agency must demonstrate that through its response program it will:

- (1) Make a timely survey and inventory of existing brownfields sites;

143. DEP'T OF TOXIC SUBSTANCES CONTROL, CALIFORNIA BROWNFIELDS CLEANUP REVOLVING LOAN FUND (RLF) PROGRAM (2008), available at <http://dtsc.ca.gov/SiteCleanup/Brownfields/upload/final-RLF-FACT-SHEET78-4-08-2.pdf>.

144. *Id.*

145. DEP'T OF TOXIC SUBSTANCES CONTROL, THE VOLUNTARY CLEANUP PROGRAM (2008), http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/BF_FS_VCP.pdf.

146. *Id.*

147. Lawrence Schnapf, *Purchaser qualifies for BPPP defense*, ENVIROLAW (Jan. 30, 2011), lschnapf.blogspot.com/2011_01_01_archive.html.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Grants Funding and Assistance*, U.S. ENVTL. PROT. AGENCY (Mar. 20, 2012), <http://www.epa.gov/region9/brownfields/grants.html>.

152. U.S. ENVTL. PROT. AGENCY, TARGETED BROWNFIELDS ASSESSMENT PROGRAM (2007), available at <http://www.epa.gov/region9/brownfields/pdf/Brochure-idea-final-05-07-07.pdf>.

- (2) Oversight and enforcement mechanisms exist ensuring that any actions taken will protect the environment and public health;
- (3) Mechanisms exist to provide for meaningful public participation; and
- (4) Mechanisms exist to approve cleanup plans and verify that cleanup is complete.¹⁵³

In an environment without RDAs, the fourth step is most problematic for future brownfields development. Current law does not allow SAs to approve new cleanup plans, and even if the law is amended to allow SAs this capability, this type of statutory right would not as a matter of course include the necessary additional enforcement and oversight mechanisms that RDAs held.

The California Recycle Underutilized Sites Program (“CALReUSE”) is another option for localities my use to fill the void left behind in brownfields development post-AB 1X 26. The Legislature funded CALReUSE in 2007 with \$60 million to provide grants and forgivable loans to help fund site assessments, technical assistance, remedial action plans and site access to brownfields.¹⁵⁴ Like other programs through the state, CALReUSE maintains fairly strict criteria for acceptance into the program. The proposed development project must create or promote residential or mixed use development, be located in a designated infill area, be consistent with local land use plans, and have a preexisting cleanup plan approved by the appropriate oversight agency.¹⁵⁵ Like the DTSC and EPA grant programs, CALReUSE presents similar problems for the remediation of brownfields through development. The most glaring complication is the program’s requirement to locate the development project in a designated infill area; although an infill area may overlap with the boundaries of a brownfields site, this depends more on serendipity than a guarantee. Even if developers and local governments surmount these siting challenges, at this point in time the CALReUSE program is largely oversubscribed, and no new applications are being accepted.¹⁵⁶

A distinct option known as an infrastructure finance district (“IFD”) exists for cities and counties who cannot garner enough support from the

153. U.S. ENVTL. PROT. AGENCY, OFFICE OF BROWNFIELDS AND LAND USE REVITALIZATION, FUNDING GUIDANCE FOR STATE AND TRIBAL RESPONSE PROGRAMS FISCAL YEAR 2013, *available at* [http://www.epa.gov/brownfields/proposal_guides/FY13-128\(a\)-Guidance-final.pdf](http://www.epa.gov/brownfields/proposal_guides/FY13-128(a)-Guidance-final.pdf).

154. CALIFORNIA STATE TREASURER’S OFFICE, CALIFORNIA POLLUTION CONTROL FINANCING AUTHORITY, CALIFORNIA RECYCLE UNDERUTILIZED (CALREUSE) PROGRAM, *available at* <http://www.treasurer.ca.gov/cpcfca/calreuse.asp>.

155. *Id.*

156. CALIFORNIA STATE TREASURER’S OFFICE, CALREUSE REMEDIATION PROGRAM, *available at* http://www.treasurer.ca.gov/cpcfca/calreuse/remediation_summary.pdf.

more traditional government grants and loans described above, and this option may be the most important source of funding for brownfields development in the future. An IFD municipal funding scheme allows taxpayers within a specified area to vote on whether to divert part of the city or county's General Fund to finance government projects.¹⁵⁷ The Legislature adopted this little-used source of public funding in 1990 to allow for cities and counties to create IFDs, divert tax revenues to them, and issue bonds in order to provide citizens with better-funded public infrastructure.¹⁵⁸ Unlike redevelopment areas, property within an IFD does not have to be categorized as "blighted."¹⁵⁹

However, IFD funding is limited to "public capital facilities of communitywide significance" which provide "significant benefits" to an area larger than the district itself.¹⁶⁰ These include, but importantly are not limited to: highways, interchanges, ramps and bridges, arterial streets, parking facilities, and transit facilities, sewage treatment and water reclamation plants and interceptor pipes, facilities for the collection and treatment of water for urban uses, flood control levees and dams, retention basins, and drainage channels, child care facilities, libraries, parks, recreational facilities, and open space, and facilities for the transfer and disposal of solid waste, including transfer stations and vehicles.¹⁶¹ Once these properties are developed, however, IFDs may not fund ongoing maintenance, services and repairs, or operating costs, and currently must be in substantially undeveloped areas.¹⁶² Further, an IFD may not encompass any part of a redevelopment project area previously created, which dampens the potential for brownfields redevelopment on such parcels.¹⁶³

Despite the creative funding and liability steps taken by cities and municipalities across the state, current law does not make clear how brownfields redevelopment should best proceed in an environment where RDAs have ceased to exist, and their redevelopment project areas and plans

157. Melissa Griffin, *Infrastructure Finance District Could Be New Way to Fund Redevelopment*, S.F. EXAMINER (Feb. 1, 2011), <http://www.sfexaminer.com/local/columnists/2011/01/new-way-finance-redevelopment#ixzz2HukEb718>.

158. William Reynolds, *Creating Infrastructure Financing Districts to Stimulate Economic Development*, Presentation to the California Association for Local Economic Development (Apr. 26, 2011), available at www.edacademy.org/wp-content/uploads/...

159. *Infrastructure Finance Districts*, SENATE LOCAL GOVERNMENT COMMITTEE (Nov. 30, 2001), <http://senweb03.senate.ca.gov/committee/standing/governance/ifdinformation.htm>.

160. Cal. Gov't Code § 53395.3 (West 2014).

161. *Id.*

162. *Id.*

163. Cal. Gov't Code § 53395.4 (West 2014).

have been passed on to SAs, cities, and counties. In this case, perhaps the lengthy list of prohibitions on the acceptable uses of IFD funds should also disappear. Only then would IFDs represent an enticing source of future funding for brownfields development. As the law currently stands, however, the majority of brownfields sites lay in previously created redevelopment sites, and are thus outside the scope of IFD funding.

Assembly Bill 2144 (“AB 2144”), under consideration in 2012, would have amended existing law to make IFD funding more accessible to the owners of former and current redevelopment areas.¹⁶⁴ The bill represented an attempt by legislators to reestablish some of the redevelopment powers taken away by AB 1X 26. AB 2144 would have authorized the creation of infrastructure *and revitalization* financing districts and allowed for the issuance of debt with 55% voter approval instead of the two-thirds majority currently required.¹⁶⁵ As part of the “revitalization,” the bill would have also authorized an IFD to finance projects in both current and former redevelopment project areas, as well as former military bases.¹⁶⁶ The overarching purpose of AB 2144 was to amend existing law so that an IFD could fund a wider variety of projects, including brownfields restoration, the purchase of property for development purposes, and environmental mitigation efforts.¹⁶⁷ The bill would have also extended the critical immunities that the Polanco Act granted IFD-initiated development actions.¹⁶⁸

In September 2012, however, Governor Jerry Brown vetoed AB 2144, claiming that “[e]xpanding the scope of infrastructure financing districts is premature. This measure would likely cause cities to focus their efforts on using the new tools provided by the measure instead of winding down redevelopment. This would prevent the state from achieving the General Fund savings assumed in this year’s budget.”¹⁶⁹ As a result, IFD law remains as it was in 1990, along with its prohibitions on funding that make the use of IFD for brownfields development quite challenging.

However, the Legislature had another chance to amend IFD law to make it more accessible for new redevelopment activities exists through Senate Bill 33, which was introduced on December 3, 2012, by Senator

164. AB 2144, Cal. Legislature, 2011-2012 Regular Sess. (Cal. 2012), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB2144.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Edmund G. Brown Jr., Office of the Governor, AB 2144 Veto Message (Sept. 29, 2012), *available at* http://gov.ca.gov/docs/AB_2144_Veto_Message.pdf.

Wolk.¹⁷⁰ If passed, the bill would make the use and creation of IFDs easier for local governments by removing the statutory requirement that voters approve the IFD's issuance of debt, and expand the use of such funding to a wider variety of projects.¹⁷¹ Funding would not come out of the general fund, however, unlike banned tax increment funding.¹⁷² Though the bill still exists, the Senate placed it in its "inactive file" on September 11th, 2013.¹⁷³

The use of Mello-Roos Community Facilities District ("CFD") funding provides another option for cities looking to continue redevelopment efforts while allowing for a broader range of projects than an IFD. A CFD is an area within which a city imposes a special tax, higher than the normal, on properties in order to provide additional revenue to pay the interest and principal on issued bonds so that the city may raise redevelopment funds for public improvements.¹⁷⁴ California Government Code section 53313.5 lists a nonexhaustive number of projects that CFD may be used for, including: making "energy efficiency, water conservation, and renewable energy improvements" to real properties, repairing soil deterioration caused by privately held properties, bringing properties into compliance with seismic regulations, and constructing and public utilities transmission and distribution facilities.¹⁷⁵

Many cities and municipalities like the City and County of San Francisco already utilize CFD funding for new projects. In early February 2013, San Francisco RDA's successor agency became the first such agency in the state to issue new bonds since the dissolution of the state's RDAs, selling \$123 million of debt left over from the former San Francisco RDA.¹⁷⁶ SAs must earmark the funds for repayment of the tax bonds previously issued by the RDA for the Mission Bay Redevelopment North and South Project, as well as reimburse this project's master developer.¹⁷⁷ Although

170. SB 33, Cal. Legislature, 2013-2014 Regular Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB33.

171. *Id.*

172. *Id.*

173. *Id.*

174. 5 Cal. Real Est. § 11:172 (3d ed.) (West 2014).

175. Cal. Gov't Code § 53313.5 (West 2014).

176. James Nash, *High-Yield in California Gives Governments Bonanza*, BLOOMBERG (Feb. 4, 2013) <http://www.bloomberg.com/news/2013-02-05/high-yield-in-california-gives-governments-bonanza.html>.

177. Memorandum from Executive Director Tiffany Bohee to Oversight Board on Resolution Approving, Under Section 34180 (b) of the California Health and Safety Code, the Issuance of Special Tax Bonds by the Successor Agency to the Redevelopment Agency of the City and County of San Francisco for Community Facilities District No. 6 (Mission Bay South Public Improvements) and Related

this is a positive development for redevelopment in the city, and will bring an influx of cash to the city, the anticipated funding falls short of the estimated \$700 million cost of full completion of the project.¹⁷⁸

C. Local Recapture of Redevelopment Funds

Since the decision in *Matosantos*, some in the development industry have deemed our time the era of “missing tax increment funding,” responsible for stalled projects across the state.¹⁷⁹ Some cities have responded to these changes by refusing to return their remaining redevelopment funds back to the state, the majority of which come from the 20% of TIF that RDAs were required to pay into affordable housing.¹⁸⁰ In Santa Clara, for instance, the mayor and city council recently sent a letter to constituents asking them to allow the city to take steps towards retaining a large chunk of redevelopment funds.¹⁸¹ California is currently asking Santa Clara for over \$300 million back in redevelopment assets, and the fight over the redistribution of RDA assets has led to delays in the construction of a school, public park and even a low-income senior housing project.¹⁸²

Further north, in Oakland, Mayor Jean Quan is attempting to move forward with plans to use \$18 million in redevelopment funding for affordable housing, despite admonitions against such actions from the California Department of Finance.¹⁸³ In July 2013, the Oakland City Council

Actions, Mission Bay South Redevelopment Project Area (Jan. 14, 2013), *available at* <http://sfgsa.org/modules/showdocument.aspx?documentid=9616>.

178. *Id.*

179. *Post-Redevelopment Opportunities in Remediation Brownfields Cleanup Funds*, RINCON CONSULTANTS, <http://www.rinconconsultants.com/about-us/blog/bid/136740/Post-Redevelopment-Opportunities-in-Remediation-Brownfields-Cleanup-Funds>.

180. Keeley Webster, *Battles Between California and Redevelopment Successor Agencies Continue*, NATIONAL MORTGAGE NEWS (Dec. 26, 2012), <http://www.nationalmortgage.com/news/dailybriefing/battles-california-redevelopment-successor-agencies-1033533-1.html>.

181. Chelsea Janes, *Long After Court Decision, Santa Clara Keeps Fighting to Hold onto Redevelopment Money*, PENINSULA PRESS (Dec. 19, 2012), <http://peninsulapress.com/2012/12/17/long-after-court-decision-santa-clara-keeps-fighting-to-hold-onto-redevelopment-money>.

182. *Id.*; Carolyn Schuk, *Far-Reaching Impact of California Redevelopment and Its Unwinding*, THE SANTA CLARA WEEKLY (August 2013), http://www.santaclaraweekly.com/2013/issue-33/far_reaching_impact_of_california_redevelopment_and_its_unwinding.html.

183. *Calif: Oakland can't spend \$18M on redevelopment*, KVTU (Jan. 11, 2013), <http://www.kvtu.com/news/news/local-govt-politics/calif-oakland-cant-spend-18m-redevelopment/nTtPc>.

passed a proposal to set aside 25% of all former redevelopment TIF revenue funds that will be redistributed by the state to local county, school districts and other entities into the Oakland Affordable Housing Trust Fund.¹⁸⁴

In addition to tax recapture mechanisms, courts have also become a popular avenue for cities to voice their grievances over the new law. Over fifty cities filed lawsuits against the state in order to recoup monies loaned by cities to former redevelopment agencies, and to protest the state Finance Department's rejections of various redevelopment projects as enforceable obligations.¹⁸⁵ Most notably, the League of California Cities filed a complaint against the state in October 2012, alleging that AB 1484 unconstitutionally reallocates local sales and use taxes from cities to the state Department of Finance.¹⁸⁶ The League of California Cities' primary claim is that AB 1484's "true-up" payment system, which requires local SAs to pay back alleged overpayments of tax increment to RDAs prior to their dissolution, unfairly takes money from city coffers to cover SAs' inability to pay.¹⁸⁷ After a ruling against the League of California Cities, in September 2013 the judge presiding over the case granted their motion for reconsideration based on new facts.¹⁸⁸ Though these lawsuits are still quite new, the state could be liable for over \$3 billion to cities and counties if such suits ultimately succeed, a number that exceeds the money saved by dissolving RDAs.¹⁸⁹

If cities fail to recoup redevelopment funds, they may be exposed to third-party lawsuits for choosing to cancel or scale back existing

184. Housing Trust Fund Project, *Oakland, California Dedicates Funds to Affordable Housing Trust Fund*, CENTER FOR COMMUNITY CHANGE (2013), <http://housingtrustfundproject.org/oakland-california-dedicates-funds-to-affordable-housing-trust-fund>.

185. Cities who have recently sued the state government for the return of redevelopment funds include Rancho Cordova and Galt. See, e.g., *Rancho Cordova Sues State over Redevelopment Funds*, THE ASSOCIATED PRESS (Feb. 6, 2013), http://www.the-reporter.com/news/ci_22529915/rancho-cordova-sues-california-over-redevelopment-funds; Loretta Galb, *Galt, Rancho Cordova, sue state finance department*, THE SACRAMENTO BEE, (Feb. 5, 2013), at 1B.

186. League of California Cities, et. al, v. Matosantos, No. 34-2012-80001275 (S.C. Cal. Sept. 24, 2012) (Petitioners' Memorandum Of Points And Authorities In Support Of Petition For Writ Of Mandate And Complaint For Injunctive And Declaratory Relief), available at <http://www.cacities.org>.

187. *Id.* at 2.

188. League of California Cities, et al., v. Matosantos, No. 34-2012-80001275 (S.C. Cal. Sept. 24, 2013).

189. *Editorial: Settling Redevelopment Lawsuits May Cost as Much as State Grabbed*, THE REPORTER (Jan. 26, 2014), http://www.the-reporter.com/editorials/ci_24996187/editorial-settling-redevelopment-lawsuits-may-cost-much-state.

redevelopment projects. These kinds of actions could be construed as a breach of contract, and substantial amounts of development and land use funds are at stake in the battle.¹⁹⁰ However, these suits may be unavoidable to a certain extent as a byproduct of the dissolution of RDAs, and cities will have to invariably seek out a patchwork of different types of financing to replace missing redevelopment funds. These alternative sources of funding, though they exist to varying degrees, are unlikely to completely replace the deficits left in city budgets by AB 1X 26.

V. Conclusion

A potentially debilitating budget crisis provided a fitting background for the *Matosantos* ruling and AB 1X 26, and the financial desperation stemming from this desperate reality undoubtedly clouded Governor Jerry Brown's radical budget actions. Now, the state has rebounded from its steep budget deficit of over \$26 billion only three years ago to a projected budget surplus of \$2.3 billion for the fiscal year 2014-15.¹⁹¹ This budget surplus casts doubt upon the ultimate propriety of the dissolution of RDAs, and increasing calls for the reinstatement and recreation of such agencies can be heard in light of this reality. However, until that day comes, if ever, cities and counties will have to become even more creative in how they sustainably develop brownfields and hazardous sites within their boundaries. Despite sharp decreases in local funding, urban revitalization and economic and community development must continue to progress in California, and brownfields remain promising locations for such growth.

190. MATTHEW REINING & SUSAN S. CORSON, STANDARD & POOR'S RATING SERVICES, REDEVELOPMENT AGENCY DISSOLUTION MAY WEAKEN SOME CALIFORNIA CITIES' FINANCIAL METRICS (2012), available at http://static.ow.ly/docs/California_RDA_Dissolution_Weakens_Metrics_Sept2012_MiH.pdf.

191. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, THE 2014-15 BUDGET: OVERVIEW OF THE GOVERNOR'S BUDGET (2014), available at <http://www.lao.ca.gov/Publications/Detail/2819>.
