MEETING DATE: 09/02/17

AGENDA ITEM:
Consideration to Invoke the Polanco Redevelopment Act for Remediation of Contaminates found at the 8801 Washington Boulevard Site.

ATTACHMENTS

ATTACHMENT 1

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MEMORANDUM

TO: J. Christopher Evans, Culver City Redevelopment Agency

FROM: Susan Y. Cola
Kane Ballmer & Berkman, Special Counsel

DATE: September 8, 2008

RE: 8801 Washington Boulevard

BACKGROUND

The Agency is the fee owner of the property located at 8801 Washington Avenue, in the City of Culver City, California ("the Property"). The Agency purchased the Property with the ultimate goal of redeveloping the Property for mixed residential-commercial uses.

The Property was formerly owned by TWS Products Co. ("TWS") and is currently designated as a hazardous waste site due to gasoline contamination. The Los Angeles Regional Water Quality Control Board ("RWQCB") has designated TWS as the responsible party for the removal of the hazardous waste from the Property, and has approved a remedial action plan ("RAP") submitted by Alpha Environmental, who was hired by TWS to clean up the Property.

In May 2008, TWS submitted a written request to the Agency, asking the Agency to allow Alpha Environmental access to the Property for the purposes of cleaning up the Property in accordance with the RAP. TWS has received a clean-up grant from the state, to cover the costs needed to carry out the RAP. Due to its concern that the Property be cleaned up to levels appropriate for mixed residential-commercial uses, the Agency retained CTL Environmental Service ("CTL") as its consultant to review the RAP. CTL reviewed the RAP and found it to be deficient in several aspects, the most critical of which is that the RAP is not sufficient to clean the Property for mixed residential commercial uses.

As a result of CTL's evaluation, Agency staff facilitated communications among the Agency, CTL, Alpha Environmental and the RWQCB. The RWQCB is aware of the Agency's concern regarding the sufficiency of the RAP and has agreed (at staff level) to review a revised RAP. Alpha Environmental has agreed to work cooperatively with CLT to submit a revised RAP to the RWQCB. However, TWS has not yet provided confirmation that it will undertake to have Alpha Environmental carry out a revised RAP. At this point, it is not known whether the costs of a revised RAP will be covered by TWS's state grant.

In light of the fact that TWS has not yet provided confirmation of its intent to clean the Property under a revised RAP, Agency General Counsel has advised Agency staff to consider use of the Polanco Redevelopment Act (Health and Safety Code 33459.1 et seq.) to ensure that the Property is remediated by TWS to acceptable clean-up levels according to an expedited schedule. Upon successful remediation, the Polanco Redevelopment Act would also provide the Agency and any subsequent developers and successors-in-interest to the Property with certain statutory immunities, which should facilitate the Agency's efforts to redevelop the Property. A brief summary of the PRA is outlined below.

BRIEF SUMMARY OF POLANCO REDEVELOPMENT ACT

I. WHY REDEVELOPMENT AGENCIES INVOKE THE POLANCO REDEVELOPMENT ACT

The Polanco Redevelopment Act gives redevelopment agencies the authority to order, or actually undertake, the investigation and cleanup of Brownfields within redevelopment project areas, and to seek recovery for an agency's remediation costs from responsible parties. As such, it serves as a powerful tool for redevelopment agencies in facilitating and expediting the process of getting contaminated properties back into productive use. The Polanco Redevelopment Act also imposes requirements on oversight agencies to provide clean up guidelines and respond to an agency's request for approval of a remedial action plan within a "reasonable period of time."

The heart of the Polanco Redevelopment Act is set forth in California Health and Safety Code section 33459.1(a)(1), which provides that a redevelopment agency:

> "may 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 [redevelopment] project area, whether the agency owns that property or not . . . ."

Responsible Parties

The Polanco Redevelopment Act provides that those who are considered "responsible parties" under the Comprehensive Environmental and Liability Act ("CERCLA") and those who are considered "dischargers" under California's Porter-Cologne Water Quality Control Act are liable to a redevelopment agency for the cost of investigating and mitigating releases of hazardous materials on property within a project area.

Remediation

The Polanco Redevelopment Act affords redevelopment agencies substantial authority in the cleanup process by granting them the discretion to determine three key aspects of any cleanup. First, the cleanup must be consistent with the agency's schedule for redevelopment. Second, the agency plays a significant role in determining appropriate cleanup guidelines (in conjunction with the regulatory community) by determining future land uses as a result of project redevelopment plans. Third, the agency is charged with the authority to determine whether a responsible party's proposed cleanup plan will be consistent with the guidelines contained in the National Contingency Plan. This grant of authority presumably allows an agency to find "consistency" in a manner that is appropriate to a particular project and its cleanup.

<u>Cost Recovery</u>

The Polanco Redevelopment Act provides redevelopment agencies with the means to require responsible parties to bear the costs of mitigating contamination on property within that agency's redevelopment project area. The elements of an agency claim for recovery of costs under the Polanco Redevelopment Act are:

(1) the property is located within a redevelopment project area
(2) the presence of a release of a hazardous substance within the project area reimbursement is sought from a defendant who is a "[r]esponsible party";
(3) the redevelopment agency has provided the responsible party with a 60-day notice requesting a remedial action plan for the property
(4) the responsible party failed to submit a remedial action plan or failed to submit a plan the redevelopment agency could approve;
(5) the redevelopment agency reached agreement on a remedial action plan with a regulatory agency overseeing the redevelopment; and
(6) the redevelopment agency incurred costs to remedy or remove the hazardous substance as necessary to implement the approved plan.

Once an agency implements the approved cleanup plan, responsible parties are liable for restitution of the agency's costs, plus interest and attorney's fees. An action to recover costs must be commenced within three (3) years after remediation.

<u>Immunity</u>

The Polanco Redevelopment Act provides the strongest form of immunity from environmental liability for California laws that is available by statute in California. Federal environmental liability statues would still apply. Upon "proper completion of a remedial or removal action," the immunity applies to the redevelopment agency, any person that enters into an agreement with the agency for disposition and redevelopment of the remediated property, any person who acquires the property after a person who has entered into an agreement with the agency for disposition and redevelopment of the remediated property, and any lenders providing financing for disposition and redevelopment of the remediated property. Responsible parties are not only liable for the cost of investigating and abating the contamination; they are also precluded from the benefits of the immunity that is conferred after the cleanup is completed.

Once that cleanup has been completed, the immunity prevents these covered parties from being ordered to do additional environmental investigation and cleanup by a state or local agency. This form of immunity has been particularly critical to lenders and "deep pocket" new owners and tenants, who fear that a cleanup approved by one of California's environmental agencies will be "re-opened" by another agency – and that the value of the property (lender's collateral) will drop as unforeseen new environmental costs escalate.

In order to access this immunity, the Polanco Redevelopment Act process must be followed. Of particular importance in this context, the Polanco Redevelopment Act requires that the cleanup plan for the property must first be approved by an authorized environmental oversight agency – either the California Department of Toxic Substances Control ("DTSC") or the Regional Water Quality Control Board ("RWQCB") and, in more limited circumstances, a local health or environmental department. The Polanco Redevelopment Act also requires that the environmental oversight agency must agree that the cleanup plan has been completed.

Invoking The Polanco Redevelopment Act

The Polanco Redevelopment Act is structured to give property owners a fair opportunity to cooperate with redevelopment agencies in completing environmental investigations and cleanups by including two owner notification requirements that are set forth in Health and Safety Code section 33459.1(b)(2). A redevelopment agency must first provide a notice to the property owner that, pursuant to the Polanco Redevelopment Act, the owner is required to prepare a cleanup plan for the property within 60 days of the owner's receipt of the letter. This notice effectively requires the owner to retain an environmental consultant to investigate soil and groundwater conditions at the property, and to propose a plan for cleaning up the property to acceptable standards based on this site investigation information.

Once the redevelopment agency, working with an authorized environmental oversight agency, approves the remediation plan, the owner is sent a second notice which requires that the plan be completed within 60 days of receipt of the notice. This notice effectively triggers a cleanup program, which generally requires the owner and environmental consultant to arrange for the excavation and removal of contaminated soil (and possible building demolition to access contaminated soils beneath buildings), and to install any groundwater remediation system (such as an extraction well and filtration device). If an owner fails to meet either the first or second of these 60-day deadlines, the redevelopment agency may step in to do the cleanup and then seek cost recovery.

As a practical matter, it is exceptionally difficult to meet either the first or second 60 day deadlines. To address this problem, the Polanco Redevelopment Act also provides a redevelopment agency with the authority to enter into an agreement with an owner that extends or modifies these deadlines, or that otherwise structure a mutually acceptable arrangement leading to the eventual cleanup of the property. These agreements can be creatively and cooperatively structured and, for example, can include cost or task-sharing agreements between the owner, the agency, and even third parties such as prospective purchasers or developers. If an owner enters into such an agreement, and then breaches the agreement, the agency may still step in to do the remaining investigation and cleanup tasks.

The Polanco Redevelopment Act's demanding deadlines create a strong incentive for the owner to enter into a cooperative agreement with the agency. Such a Polanco Redevelopment Act agreement can stand alone, or be part of an overall set of agreements to cause the cleanup and redevelopment of the property. Moreover, structuring such a cooperative agreement can be a substantial benefit for the agency, subsequent owners and tenants, and their lenders, all of whom then enjoy some further protections from environmental liability under the Polanco Redevelopment Act's immunity provisions.

Undertaking The Remediation

The most effective method of reducing environmental liability for contaminated property is to fully implement the cleanup plan as required by the environmental oversight agency. Consequently, once a redevelopment agency begins the cleanup process, it incurs the environmental risks and liabilities that are inherent in managing a contaminated site – and the agency should be fully prepared to complete the cleanup even if site conditions are substantially worse than initially anticipated. Stopping work because of funding constraints, prolonged or hostile negotiations with the environmental oversight agency, or changed political leadership, are all examples of problems that must be identified and resolved prior to beginning a cleanup or acquiring the contaminated property.

On the other hand, if a property owner or responsible party commences the cleanup and fails to timely complete it, the redevelopment agency may thereafter finish the job and recover its costs from the nonperforming party even if that party belatedly offers to recommence cleanup activities.

II. RECOMMENDATIONS FOR CULVER CITY REDEVELOPMENT AGENCY REGARDING THE PROPERTY

As a preliminary matter, the Agency needs to assess whether it desires to invoke the Polanco Redevelopment Act ("PRA"). The advantages of invoking the PRA are that the Agency can expedite remediation of the Site for its intended reuse purposes under the Redevelopment Plan (i.e., "residential") and seek cost recovery from any responsible parties. The disadvantages of involving the PRA are that the Agency may have to front remediation costs, undertake the remediation, and then seek recovery. While not a certainty, it is also possible that the Agency's invocation of the PRA may trigger a higher level of clean up and monitoring scrutiny by the supervising agency due to the immunity afforded after remediation.

Assuming, however, that the Agency desires to invoke the PRA, we recommend that the Agency take the following steps:

Step 1 – Request Clean-up Guidelines from the RWQCB

The request should specify the Agency's desired uses for the Property and request that, in accordance with the PRA, the Guidelines be provided within a reasonable period of time.

Step 2 - Issue First 60 Day Notice

Upon obtaining the Guidelines, the Agency should issue the first 60 day notice to TWS. The notice should advise TWS of the Agency's authority and intent to invoke Polanco to remediate the Property for mixed residential-commercial uses, provide a copy of the Guidelines, and make a demand to TWS for submittal of a revised action plan ("Revised RAP") for the Property within sixty (60) days.

It is very likely that after the receiving this notice, TWS will contact the Agency and work out a proposal. The Agency has authority under the PRA to extend the deadlines and negotiate with TWS, as long as the RWQCB approves of the proposal.

Step 3 – Approval of the Revised RAP

Upon obtaining a proposed Revised RAP, the Agency must evaluate the Revised RAP, consult with and seek the written approval of the RWQCB. The approval of the RWQCB should acknowledge that upon proper completion of the Revised RAP, the PRA immunity will apply.

Step 4 – Issue Second 60 Day Notice

Once the Revised RAP has been approved by both the Agency and the RWCQB, the Agency will need to issue a second notice to TWS that the Revised RAP must be implemented within sixty (60) days or as agreed upon by the Agency. This notice effectively triggers the clean up. At least thirty (30) days prior to commencing any clean up activity, the Agency will need to provide the RWQCB with notice of the impending clean-up activity. The Agency must then monitor TWS's compliance with the Revised RAP. If TWS fails to submit a Revised RAP or submits an approved Revised RAP, but fails to implement the Revised RAP in either substance or timeliness, the Agency may undertake the remediation in accordance with the approved Revised RAP.

Step 5 – Cost Recovery

If the Agency undertakes the remediation, the Agency can seek costs from TWS. If the responsible party fails to pay those costs, the Agency may file a restitution action in court. Ideally, however, the Agency will work cooperatively with TWS to obtain voluntary compliance with the Revised RAP.

Step 6 – Immunity

Once the clean up has been completed in accordance with the Revised RAP, the Agency should request a certificate of completion from the RWQCB. The RWQCB n should provide notification that the written approval within sixty (60) days of the approval. The approval should specifically advise the Agency that the PRA immunity is in effect.

CULVER CITY REDEVELOPMENT AGENCY

RESOLUTION NO._______

A RESOLUTION OF THE CULVER CITY REDEVELOPMENT AGENCY, AUTHORIZING THE USE OF THE POLANCO REDEVELOPMENT ACT TO REMEDY OR REMOVE A RELEASE OF HAZARDOUS SUBSTANCES ON PROPERTY LOCATED AT 8801 WASHINGTON BOULEVARD, WITHIN THE CULVER CITY REDEVELOPMENT PROJECT AREA

WHEREAS, the Polanco Redevelopment Act (California Health & Safety Code sections 33459 *et seq.*)(the "Act") authorizes a redevelopment agency to take any actions that the agency determines are necessary and 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 the property or not, subject to the conditions specified in section 33459.1(b) of the Act; and

WHEREAS, the Culver City Redevelopment Agency ("Agency") is engaged in activities necessary to implement the Redevelopment Plan ("Redevelopment Plan") for the Culver City Redevelopment Project Area (the "Project Area"), and has acquired certain real property located at 8801 Washington Boulevard, in the City of Culver City ("the Property") to effectuate the Redevelopment Plan; and

WHEREAS, the Property is located within the Project Area; and

WHEREAS, in February 2005, prior to purchase by the Agency, the Property was the subject of a Phase I environmental analysis, which was completed by Agency environmental consultant Smith-Emery Geoservices ("Phase I Analysis"); and

WHEREAS, the Phase I Analysis alerted the Agency that the Property was used as a gasoline service station by a former owner of the Property, and that the Property was the subject of quarterly monitoring overseen by the Los Angeles Regional Water Quality Control Board ("LARWQCB") as soil and groundwater contamination had been discovered during the removal of underground gasoline storage tanks; and

WHEREAS, the Los Angeles Regional Water Quality Control Board determined that TWS Products, Inc. ("TWS") is a "responsible party" within the meaning of the Act; and

WHEREAS, Smith-Emery Geoservices recommended additional Phase II testing to determine the extent of the contamination; and

WHEREAS, upon completion of the Phase II analysis and document review, Smith-Emery Geoservices determined that the Property had contamination levels of hazardous substances that require remediation; and

WHEREAS, to facilitate the redevelopment of the Property and fulfill the Agency's duties under the Community Redevelopment Law (California Health and Safety Code sections 33000 et seq.), the Agency now seeks to utilize the protective and cost recovery provisions of the Act to remedy or remove the release of hazardous substances on the Property.

NOW, THEREFORE, the Culver City Redevelopment Agency, hereby resolves as follows:

1. The Agency hereby finds and determines that all recitals set forth in this resolution are true and correct and incorporated herein in full by this reference.

2. The Executive Director, or designee, is authorized to take any actions authorized by the Act to assist in the cleanup, reuse and redevelopment of the Property.

PASSED AND ADOPTED THIS ________________ DAY OF ______________, 2009, BY THE FOLLOWING VOTE:

AYES:
NOES:
ABSENT:
ABSTAIN:

CULVER CITY REDEVELOPMENT AGENCY

____

ATTEST:

____
Agency Secretary

APPROVED AS TO FORM:

KANE BALLMER & BERKMAN

____
Murray O. Kane,
Special Counsel to the Agency