

Chapter 6

Gaining Site Access

When attempting to redevelop abandoned and contaminated properties, one of the most difficult challenges can be gaining legal access to the property. Without permission of the owner, a government agency cannot legally enter the site, conduct testing, or remove USTs. For example, here is a typical situation: A city identifies a former gas station site that appears to have USTs in place. It is vacant or occupied by someone who does not have permission to be there. The owner has not paid taxes in years but the county has not been able to sell the property. The owner of record cannot be located. If the site has contamination, it may be eligible for EAR Account Funding but in order to test for contamination, the city would need to get on the site. How does the city get access? Or if the site shows obvious signs of contamination and the city obtains EAR funding, how does the city get on the site to conduct testing and remediation activities.

By Permission of the Owner

If the owner can be found, he or she may choose to grant access rights. An attorney should draw up an agreement between the owner and the agency to grant the agency the right to enter the property to take specific actions. Owners should be encouraged to seek their own legal counsel if they are able to do so. If they are not able to obtain legal representation, the city should attempt to design an access agreement that protects the rights of the owner as well as the rights of the city.

Polanco Act

If a site is in a California redevelopment agency designated redevelopment area, the redevelopment agency can gain access to property for which it has a redevelopment plan through a state law known as the Polanco Act ([California Health and Safety Code 33459 - 33459.8](#)). This law provides a procedure by which a redevelopment agency can order responsible parties to perform needed actions such as testing and cleaning up contamination. If the owner (or other responsible party) does not cooperate, the redevelopment agency can test and remediate the property itself or through a contractor and seek cost recovery and attorney's fees through a civil action. The redevelopment agency can also require the responsible parties to provide environmental information that they may possess. These actions can be taken on property owned by the redevelopment agency or on property owned by others. The cleanup plan must be approved by the applicable state agency such as the Regional Water Quality Control Board or Department of Toxic Substances Control. For properties at which the Polanco Act is used, the redevelopment agency and any future owners (but not persons responsible for the contamination) receive immunity for liability for the contamination.

The Polanco Act process requires the assistance of an attorney knowledgeable about using this mechanism and the process can require substantial legal assistance. However this law is a

powerful mechanism to bring about remediation and redevelopment of contaminated properties. See Appendix A for sources of more information about the Polanco Act.

California Land Environmental Restoration and Reuse Act of 2001 (CLERRA)

In 2001, the California Legislature passed SB 32 also known as the California Land Environmental Restoration and Reuse Act of 2001 which established a procedure through which municipal governments to access the same powers granted by the Polanco Act for use in geographic areas not in redevelopment areas. However, the powers can only be used on very small sites that are vacant. Each city or county must pass an ordinance implementing the legislation and designating an implementing agency and geographic areas that will be included. The notice and public participation aspects are also extensive but in certain circumstances, this law may be the best way to gain access to an abandoned property.

Bankruptcy Judgment

If the bankruptcy is active, creditors are trying to gain access to assets of the debtor. It may be possible for the bankruptcy judge to grant the city access to the site to conduct investigations and remediation that would enhance the value of the property so that it could be sold or transferred to pay off debts of the debtor. An attorney would probably be needed to help sort out bankruptcy issues for a particular property. Perhaps creditors could fund a search for an insurance policy that covered the site. See paragraph on Insurance in [Chapter 5](#).

Court Order

Under certain circumstances it is possible for a governmental agency to get a court order to enter a site to correct a danger to public health. Most abandoned gas station sites do not present a hazard to public health sufficient to obtain such an order. The City of Los Angeles has been able to get a court order to enter and test potentially contaminated property that the City is considering purchasing for a public use under authority of eminent domain. Redevelopment agencies also have certain authorities to enter properties they are considering purchasing. This is a complex area of law, utilization of which will require assistance of an expert.

Eminent Domain

If the agency is planning to purchase property through an eminent domain process, it is possible to ask the court to approve access to the property to assess the level of contamination because this would be necessary to determine the value of the property. Determining the value of property is a normal part of such a procedure. Redevelopment agencies, cities, counties and other agencies that acquire property for public use are familiar with this process. In the City of Los Angeles, this is General Services Department.