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Contaminated Properties: Brownfields and Reuse Options for Local Governments

By
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Every day, in almost every city in America, a common scenario plays out: An old industrial plant or commercial facility lies dormant. The site is an eyesore, just one more deficiency in an already blighted or undesirable area of town. There are no good prospects for development, and even if there were, the environmental contamination on the property would likely render development difficult, if not impossible. The local government has a plan for the area, including some means to enhance private interest in developing the property or some way to convert it to some form of beneficial public use, but the environmental problems preclude either. What is the local government to do?

The thesis of this paper is that, even in the described scenario, a proper mix of available environmental measures can frequently remove all material impediments to development. Even more, we believe that in appropriate cases, addressing the underlying environmental issues can actually aid the prospects for development. In the sections below, we address four topics: (1) the "brownfield" issue; (2) understanding the environmental problem; (3) addressing the underlying economic issues; and (4) how local governments can be part of the solution.

The Brownfield Issue

Federal and state environmental laws generally establish a liability system for environmental contamination that has been described as "strict, joint and several, and retroactive." In particular, at least until recently, every person who owned contaminated property faced four forms of potentially devastating liability, even if that person had absolutely nothing to do with contaminating the property in the first place: strict liability for cleaning up the property, tort liabilities to third parties, difficulties in selling or financing the property, and limitations on the property's use. (For a more detailed summary of the risks of owning contaminated property, see *Environmental Advisory*, "Purchasing and Owning Contaminated Property: A Primer for Property Owners" (July 2005) which can be found at www.mckennalong.com, News and Publications.

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For these reasons, conventional wisdom held that contaminated properties should be avoided at all costs, leading prospective purchasers to seek out never-used properties in undeveloped areas (so called "greenfields") and to avoid contaminated industrial properties located in urban areas (or "brownfields"). Combined with numerous other social factors, the environmental laws were having the unintended consequence of forcing developers to avoid the very areas most in need of revitalization and creating nearly irresistible incentives for sprawl.

The magnitude of the problem is impressive. Nationwide, there are 6400 sites regulated under the "hazardous waste" program, 40,000 federal "Superfund" sites, and anywhere from 100,000 to 200,000 regulated underground storage tank ("UST") sites. On top of this, there are 450,000 to 600,000 generic "brownfield" sites, meaning sites "contaminated" under applicable environmental laws or otherwise subject to state or federal cleanup standards. If all of these sites were, in essence, taken out of the inventory of eligible development areas, the pressure for greenfield flight was creating an urban blight as an unintended consequence of environmental priorities.

The situation eventually became so intolerable that, over the objections of many environmental organizations, state and federal governments began to develop statutory changes to exempt more or less "innocent" purchasers from the worst of these environmental burdens. That, in turn, led to the creation of a wide array of "brownfield" laws, which were quickly followed by various forms of grants and incentives. Once purchasers were freed from a mandatory environmental death penalty, the market was free to develop numerous private mechanisms to complement the statutory changes, resulting in an increasingly vibrant atmosphere for the purchase and development contaminated parcels.

Local governments not only have much to gain by understanding the dynamics of this change, they can also play an important role in facilitating the redevelopment, directing both the location and the nature of the redevelopment to the areas of highest governmental priority. We have seen numerous examples of how local governments can be the enabling force in all of this, including:

- Facilitating the redevelopment of a massively contaminated steel mill into a spectacular mixed-use urban development;
- Converting formerly contaminated properties to parks, walkways, and waterfront developments;
- Removing eyesores, including dilapidated buildings and overgrown waterways;
- Improving and relocating roadways, bridges, and other transportation infrastructure; and
- Replacing run-down shanties with high-quality (but low-cost) housing.

The questions are not so much can this—and much more—be done, but how? At what cost? Through what mechanisms? It is these issues to which the remainder of this paper is addressed.

Understanding the Environmental Problem

Before a local government can sensibly deploy any of the available brownfield measures, it must develop a thorough understanding of the underlying environmental problems. While a complete discussion of the process is beyond the scope of this paper, understanding the environmental "problem" will generally involve, in turn, understanding the nature and extent of the contamination and understanding the legal requirements that direct how the problem must be handled. Each of these is discussed briefly below.

Understand the Nature and Extent of Contamination.

In most cases, at the initial stage, the objective is to develop an understanding of the nature and extent of contamination that is appropriate to the problem at hand. Environmental assessments can be extremely expensive and can be so time consuming as to lead to "paralysis by analysis." The challenge is to be sensible. Scoping a "proper" environmental investigation will generally proceed as follows:

- A written, detailed outline of the legal/regulatory and development objectives of the study. If one is to avoid an interminable sequence of protracted and expensive studies, on the one hand, or grossly insufficient assessments on the other, it is essential to understand the regulatory requirements and how the future development can play into those requirements.

- An initial investigation directed towards those objectives; and

- Follow-up investigations based upon the initial results and the objectives of the assessment.

Typically, there are two kinds of mechanisms available to develop an understanding of the environmental issues associated with any parcel: (1) standardized assessment processes and (2) regulatory investigation sequences, both of which have numerous variations.

"Standardized" assessment processes include such mechanisms as the ASTM "Phase I" investigation (E-1527), as well as the various "phased" follow-up investigations (including the ASTM "Phase II" E-1903 assessment guide and dozens of other related standards). There are several factors to keep in mind when thinking about these various standardized assessment processes:

- Despite the common reaction of the uninitiated to "go get a Phase I," a Phase I investigation, at least as it is commonly conducted, is virtually useless as a brownfield evaluation device;

- The same may be true for the typical Phase II study, which is usually only sufficient to rule out impacts, but which does not provide an adequate characterization of the contamination.

- A comprehensive characterization usually is more than is necessary for a brownfields project.

On the regulatory side, the starting point is the sequence of investigations, designs, and approvals that are more or less mandatory, depending on the state's brownfield program. For sites subject to EPA oversight, for example, the sequence follows that prescribed by the National Contingency Plan ("NCP"):

- Preliminary Assessment ("PA")
- Site Investigation ("SI")
- Remedial Investigation ("RI")
- Feasibility Study ("FS")
- Remedial Design ("RD")

In the brownfield context, the situation gets doubly complicated: first, because the assessment is frequently driven by the requirements of the development, which may be more or less than what is legally required, and second, because many state statutes exempt brownfield owners from the process entirely or impose a different set of requirements. For example, Georgia's Hazardous Site Reuse and Redevelopment Act, O.C.G.A. § 12-8-200, et seq., requires the investigation of "source" material on the subject property. Under North Carolina's Brown Fields Property Reuse Act of 1997 (NCGS §§ 13A-310.30-40) site cleanup is required only to the extent necessary to make the site safe for intended reuse.

Each state's brownfield investigation and cleanup requirements necessarily dovetail with a larger body of environmental regulations governing the cleanup of hazardous sites in those jurisdictions. As such, exploration of these requirements would require detailing of each state's program, which is beyond the scope of this paper. However, in general, the investigation and cleanup requirements imposed on brownfield projects are relaxed, either by regulation or practice.

Understand the Regulatory Requirements

As noted above and referenced in the *Environmental Advisory*, there are at least four categories of liabilities associated with contaminated properties. Of most interest in the municipal brownfield area, though, are the regulatory requirements. These requirements come in two varieties: those that regulate the site itself (including all former owners and operators who may or may not be responsible for site expenses) and those that regulate future owners and their options to limit their liabilities for site conditions.

The site regulatory requirements that will be of most interest in the brownfields context are those that establish acceptable degrees of contamination, those that establish the required cleanup methods, and those that establish permissible uses on brownfield properties. Indeed, one might say that these are the most important considerations in the entire brownfield process.

In this regard, most brownfield programs try to strike a balance among three competing factors: protecting human health and the environment, returning the property to productive use, and limiting the general burden on an otherwise innocent party. The first objective, of course, is the trump card. Nothing can proceed unless a reasonable degree of protection is assured. For obvious reasons, the law does not allow even an "innocent" purchaser to put a highly sensitive use on a toxic waste dump. Beyond that simple observation, though, things get surprisingly complicated.

For example, the federal government has recognized that there may be no level of contamination at which one can say with absolute certainty that there is absolutely zero risk of any harm. As a result, it has developed various standardized risk assessment methods and corresponding "acceptable" risk levels, typically one-in-a-million (1×10^{-6}) or one-in-one-hundred-thousand (1×10^{-5}). These principles, in turn, result in "acceptable" levels on contamination. Because the assumptions that go into the risk assessment are based on the exposures people might receive under the applicable land use circumstances, it is not unusual to find different levels of acceptable contamination for different kinds of uses, such as residential, recreational, industrial, and so on. Acceptable levels can also be based on other kinds of environmental concerns, such as leaching to groundwater or toxicity to ecological receptors. States usually have corresponding programs.

If there is a discrepancy between the acceptable levels of contamination and the contamination actually present, then some form of cleanup or other remedial measure must be employed.

Most regulatory agencies have the institutional preference for excavation of contaminated soil. Indeed, many private parties have the same preference. The problem is that such a remedy is frequently prohibitively expensive. For example, if one uses a rule of thumb of $100 per ton to excavate, transport, and dispose of contaminated soil, then a relatively tiny 5-acre site, with excavation to only 10 feet, would cost $12 million just for soil excavation. As a result, site-wide excavation of all contaminated soil is rarely required or economically feasible, and instead one usually considers more limited options, such as:

- Excavation to the "residential" cleanup standard only in the uppermost soil horizon, usually two feet;

- Cleanup methods besides excavation, such as vaporizing the volatile contamination or bioremediation;

- "Fixing" the materials in place rather than removal; and

- "Capping" the site to prevent or limit exposure to the contamination ("capping" can be in the form of a parking lot or building).

For groundwater, the situation is even more complex. Just as for soil, the most obvious remedy (pumping the contaminated groundwater out of the ground, treating it, and then either reinjecting it to the ground or discharging it) is rarely technically or economically justifiable. For this reason, a wide range of alternatives are usually considered, including:

- "Monitored natural attenuation" (which means leaving the contamination to natural biodegradation, but subject to continued monitoring to assure that no risk materializes to persons using the groundwater and that the biodegradation process is actually working);

- Injecting air or placing a vacuum over the groundwater to drive off volatile contaminants;

- Treatment of the contaminated groundwater in place, such as through methods to inject oxidizing chemicals; and

- Containment or capture and treatment of the groundwater.

In some cases, the regulatory agency will have presumptive requirements for soil and groundwater cleanup actions, but in others, especially in the brownfield context, the appropriate measure may be left up to the property owner, with or without regulatory approval.

On top of all of this, most agencies also permit, especially in the brownfield context, various engineering or institutional controls. Institutional controls are generally designed to reduce or eliminate potential exposure to residuals remaining on the property and prevent activities that may interfere with engineering controls. Institutional controls can take many different forms, such as: easements, restrictive covenants, zoning, building permits, prohibition on groundwater use, and contractual agreements. For brownfield projects, the best approach may be to use more than one institutional control. Institutional controls must also provide notice to future landowners, tenants, lenders and others interested in the property. Finally, in order to ensure the property poses no significant risk, engineering and institutional controls must be maintained, usually forever.

Understanding Brownfield Eligibility

All of the preceding cleanup requirements, however, are subject to substantial differences in the brownfield context. As shown in the *Environmental Advisory*, a brownfield purchaser can avoid most or all of these costs if: (1) he acquired the property after the contamination had already occurred; (2) made all appropriate inquiry into the past uses of the property prior to acquiring it; (3) provides all appropriate notices associated with the contamination located on the property; (4) exercises appropriate care regarding the contamination on the property; (5) cooperates in all actions to investigate and clean up the property; (6) complies with all land use controls on the property; (7) complies with all information requests; and (8) has no affiliation with persons responsible for contamination or for cleaning it up. 42 U.S.C. § 9601 (40). In addition, the property itself must: (1) not be subject to a response action by a responsible party; (2) not be listed on the National Priorities List or proposed for listing; (3) not be subject to an unilateral administrative order, court order, administrative order on consent, or consent decree issued under CERCLA; (4) not be subject to a corrective action under federal laws; (5) not be a land disposal unit with closure notification submitted and a closure plan or permit; (6) not be contaminated with PCBs subject to remediation under TSCA, or (7) not be subject to other federal jurisdiction. 42 U.S.C. § 9601 (39). Assuming that both the prospective purchaser and the property itself are "qualified," the costs reduction available to a brownfield purchaser are those discussed above.

As you might imagine, each state, under its brownfield program, has defined who and what type of contaminated property can qualify for the brownfields program. See EPA's State Brownfields and Voluntary Response Programs, An Update from the States on EPA website, at htm://www.epa.gov/swerosps/bf/psbs/st._res_prog_report.htm.

Note that there is a subtlety at work here, which will become more apparent in the following section. One can frequently obtain significant cost reductions by changing the applicable use of the property (going, for example, from residential to industrial), or by employing remedies less than a total cleanup (such as solidifying the contamination in place), or by employing engineering controls (such as a protective cap) rather than a cleanup, all of which may be more available for brownfield purchasers than for others. The tradeoff is that such alternative cleanup strategies may, and frequently will, reduce the value of the property. While the net effect is frequently a net positive, it will not necessarily always be so.

Understanding the Economic Issues

Once one has an understanding of the understanding of the environmental problem, the real work begins. At this point, the inquiry turns to a comparison between real estate investment realities versus the economics of dealing with the site, an equation driven by the cost of dealing with the environmental problem, the inherent value of the property itself, and the contributions of brownfield considerations to both components.

Economics of Real Estate Development

Except in unusual circumstances (to be discussed below), or except for public use developments (such as parks), there can be no prospect for a brownfield development unless there is an *a priori* potential for a profitable real estate development in its own right. Therefore, local governments must first consider and evaluate the underlying real estate potential before getting too excited about any brownfield site.

Based on the first quarter of 2005, the amount of commercial and multi-family lending for 2005 will exceed $200 billion. Every sign seems to indicate that the lethargy of the real estate development market over the past three to four years is now drawing to a close. This fact combined with the huge number of available brownfield sites, makes this a particularly opportune time for brownfield development.

The real estate market is driven largely by the combination of economic growth and capital markets, with the critical economic activity being that of the locality where the development is proposed. Real estate developers strive to obtain a rate of return at least slightly better than that offered by alternative investments, adjusted for relative risk. At least some investment advisors suggest that typical real estate investors require a return of 600 basis points or more over the rate offered by 10-year treasury bills, which is to be expected since real estate competes with other opportunities for "risky" capital investments. In other words, if 10-year T-bills are expected to run at 5%, the required return for real estate investment will be something around 11% or more.

All of this is complicated by several factors in the brownfield context, issues that are taken up in the following sections.

Cost of Cleanup

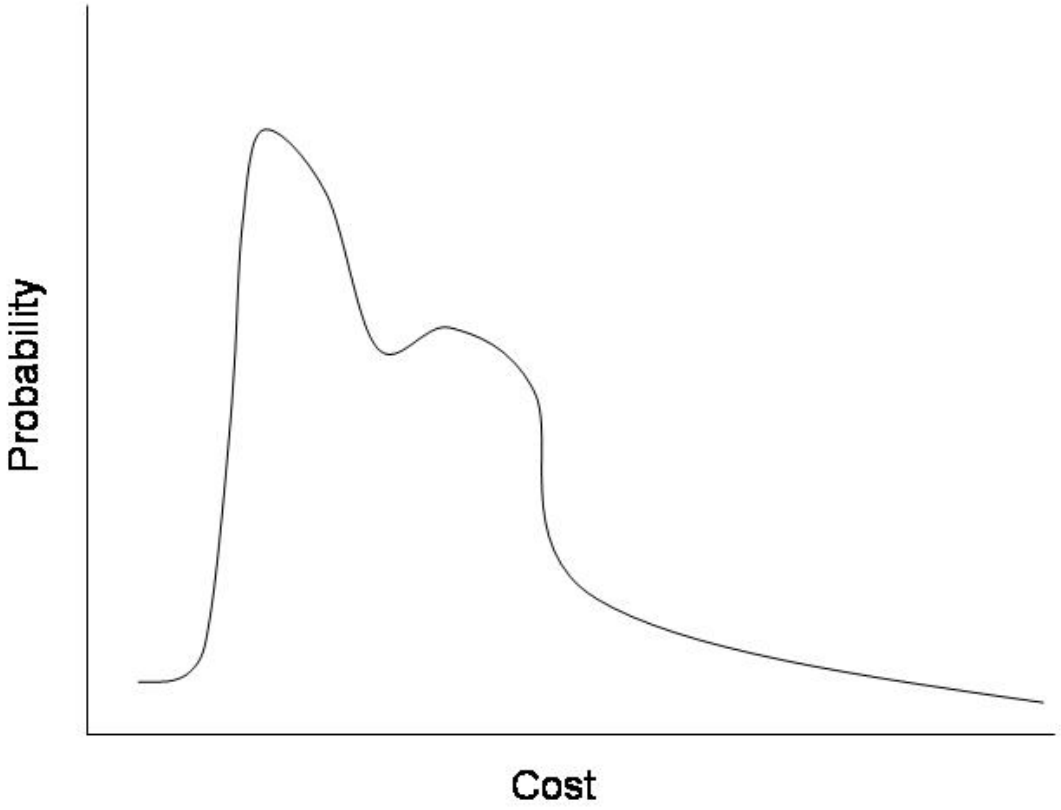
The most important aspect of dealing with redevelopment of brownfield properties is getting a reasonable understanding of the cost of dealing with the environmental problem. And nothing is as easy to bungle as that effort. Just a few of the complications are listed below.

The extent of contamination cannot be known with certainty until the cleanup is concluded. At any early cost-estimating phase, therefore, this can cause the estimation either to be grossly underestimated or, in a fit of "conservative" worst-case estimates, cause the estimated cost to be so high as to nix any real estate deal. As a result, we generally suggest that the estimator prepare a range of estimates based on cost-drivers varying from reasonably best case to reasonably worst case.

There may be requirements for future action, which, at the very least, have to be carried as contingent cleanup costs.

The contamination remaining on the property may change the cost of development. The most common consideration is that, if deeper contamination is left in place, then engineering features of future construction (such as footings or pilings, or below-grade structures such as parking decks, or dewatering the site) may encounter contamination that will have to be dealt with.

Compounding this, the cost estimating process has contingencies within contingencies, with uncertainties piled on top of guesses, and mixed in with assumptions and judgments. All of which, one might think, leads to a basically useless product. While the sentiment is understandable, and in fact is an accurate characterization in some instances, such need not necessarily be true. A typical cost estimate will usually yield a curve something like the following:



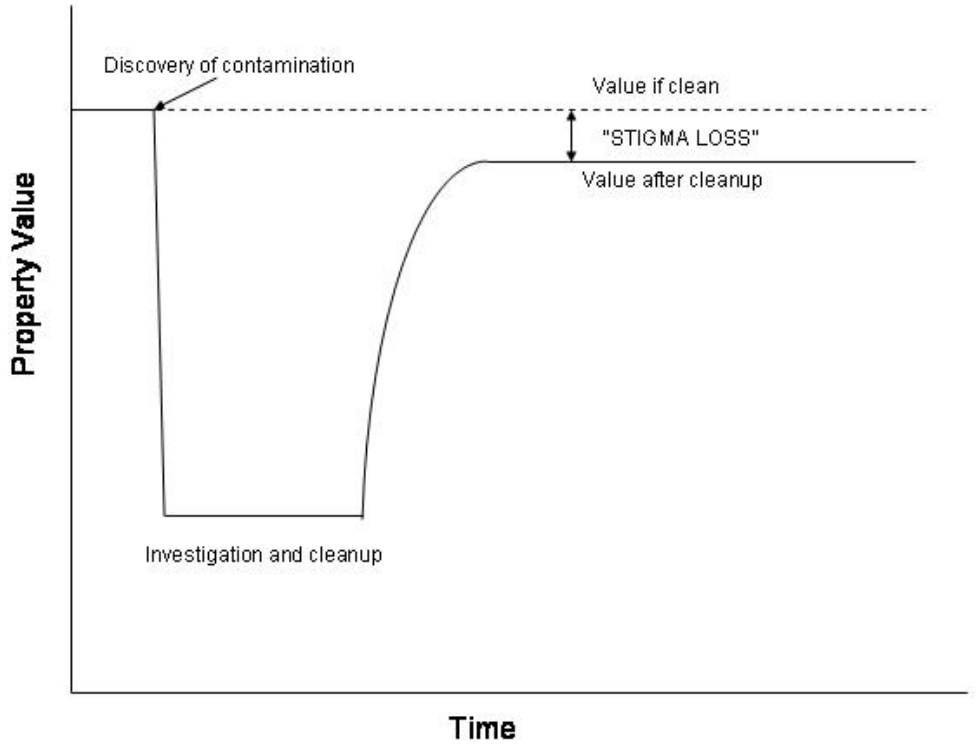
While there is considerable variable in the range of costs, most engineers and number-crunching businessmen can actually extract a fair amount of financial significance from curves of this type, including the approximate center of the curve, the overall range between best and worst cases, and the costs associated with the most likely alternatives.

At least some of the uncertainties in the cost estimation equation can be addressed through the judicious use of insurance. Environmental insurance is one specialized form of casualty insurance, namely, one that insures against losses associated with environmental contamination. Environmental coverage tends to be based on site-specific environmental data. While there are many variations of environmental coverage, there are two kinds of environmental insurance that can be important in a brownfield transaction. The first is “cost cap” coverage. Also known as “stop loss” or “guaranteed fixed price remediation,” the purpose of such coverage is to provide some assurance that the cost of cleaning up known contamination on a parcel will not exceed a specified amount. The other kind of coverage is “pollution legal liability” (“PLL”) coverage. PLL policies can cover both fist party liabilities and third party coverage. Significantly, it is possible to purchase PLL coverage even for future losses for the property owner. As with all insurance coverage, understanding the coverage and exclusions is critical.

Property Value

In the brownfield context, determining the "value" of a parcel is not so easy. The upper limit in theory could be the highest and best use of the property in an uncontaminated state. However, since brownfields are usually subject to use restrictions, the actual starting point is usually the best use of the property subject to the required use restrictions.

Starting with use-limited value, there are normally a series of deductions, which are more or less quantifiable. The most obvious is that brownfield owners frequently perform less of a cleanup than would ordinary "responsible parties." While that saves on cleanup costs, it also leaves the brownfield owner owning a parcel that, besides having a restricted use, still has some residual degree of contamination. The presence of that contamination can create what is called "stigma" associated with the property, which have the effect of decreasing the value of the property, increasing the cost of financing (which has the same effect), or both. The following graph illustrates the idea of "stigma losses."



The amount of the "stigma" decrease to the property value will depend upon a number of factors, not the least of which is the sophistication of the buyer and seller. In many cases, indeed, the stigma loss will actually be zero, but the prospect of some tweaking to even a properly use-based value must be considered.

Brownfield "Positives"

At the heart of all brownfield programs is the limitation on liability that relieves the applicant (usually a prospective purchaser) and that person's successors and assigns from future obligations. As an example, Florida's basic liability provision provides that a qualified prospective purchaser, including his successors and assigns, shall be relieved of further liability for the remediation of the site to the state as well as third parties. See Fla. Stat. § 376.82(a). As to other forms of liability protection, however, the picture is not so clear. Most liability limitations do not extend to all claims by neighboring property owners for diminution in value. See Fla. Stat. § 376.82(b). Georgia law, on the other hand, seems to provide broad protection against tort claims based on pre-existing contamination. See O.C.G.A. § 12-8-207 (a). Thus, how broad the tort immunity protection offered is unknown at this time. Another limitation of immunity is that some agencies take the position that the immunity covers only documented pre-existing releases. That position has not, to our knowledge, been legally tested.

However, the typical brownfield program allows the buyer, and its successors and assigns, to escape further liability for the pre-existing condition if someone faithfully carries out an agreed-upon investigation and clean up, which is typically more practical in scope than would be required of a responsible party. Although residual impacts may remain, experience has shown they are rarely the source of unexpected problems. Further, as noted above, it is generally possible to insure against any residual risks.

How Local Governments Can Be Part of the Solution

As is apparent from the foregoing, while development of brownfields can be somewhat more complex than that for uncontaminated parcels, brownfield development is perfectly amenable to rational, step-wise analysis. In this process, what is the role for local governments and how can they enhance the investment attractiveness of local brownfield developments? There are at least four categories for local governments to consider: (1) land use, zoning, and government services; (2) condemnation; (3) government-based financing and grants; and (4) community relations.

Land Use, Zoning, Services

The first contribution that local governments can make to brownfield development is also the most obvious: ordinary government land use measures. For example, where groundwater is contaminated and might otherwise form a risk concern for the environmental agency, the local government can enact an ordinance barring groundwater use and requiring connection to the municipal water system. Where a cleanup option requires non-residential cleanup standards, the local government can zone the area for commercial use only.

Besides use restrictions, governments can also assist, in appropriate cases, through ordinary real estate instruments. For example, most environmental agencies are reluctant to accept health and safety measures (such as inspections, maintenance, mandatory safety procedures) as a cure for residual contamination. We have overcome that reluctance in several cases through filing a "Health and Safety Plan" (HASP) with the local building department, and

making compliance with the HASP mandatory through the use of a recorded instrument. Instruments that have been used to involve the local government in accomplishing similar goals include restrictive covenants, various easements, and equitable servitudes (particularly affirmative servitudes). Some standardization in these instruments is occurring through measures such as the Uniform Environmental Covenants Act. (As of mid-2005, UECA had been enacted in seven states and introduced in roughly a dozen more.) In all of these, however, it is the prospect of local involvement, including local government enforcement, that gives comfort to environmental agencies.

Another similar set of options arises through the possibility of combining private brownfield development with nearby municipal improvement projects. For example, we have been involved in developments where an old abandoned steel mill was turned into a 135 acres mixed-use development; an old manufactured gas plant site property and former incinerator property were converted to a multi-model transportation facility by the municipality; and an abandoned waterfront facility was converted to a mixed-use marina development.

Condemnation

While it is too soon to say much about how Kelo v. City of New London, _____ S.Ct. _____ (2005), will play out, and indeed the case is the topic of other current papers, it is not too much to say that the case may have dramatic and far-reaching implications for local government redevelopment efforts. And since the entire brownfield concept revolves around redevelopment, one might justifiably conclude that the local government options created by the Kelo decision should be incorporated into brownfield planning. At the same time, though, there has not been much analysis on the relationship between expanded powers of eminent domain and the requirement for brownfield immunity. While there are established governmental immunities where the property is taken involuntarily (e.g. by escheat), the situation with respect to voluntary acquisition through condemnation, especially for private development, is less clear.

Financing and Grants

Obviously, there are a large number of economic development incentives available to private parties. For example, under the Brownfields Tax Incentive, environmental cleanup costs, subject to certain limitations, are fully deductible in the year they are incurred, rather than having to be capitalized. There is also the New Markets Tax Credit Program to promote economic development in rural and urban low-income communities. This federal tax initiative is designed to increase the amount of investment capital available to business and economic development programs in low-income communities by allocating tax credits to certain qualified entities.

Even local governments can play a big part in the economics of a brownfield development. Some of the key incentives are:

Tax Increment Financing/ Tax Allocation Districts

Tax increment financing is known in Georgia as a tax allocation district ("TAD"). In Georgia, for example, local governments are authorized to create TADs by the Redevelopment

Powers Law, O.C.G.A. § 36-44-1 et seq. Once a county or city has created a TAD, it may issue bonds to finance infrastructure and other redevelopment costs, including brownfield development. Types of redevelopment costs available for reimbursement include capital costs for the construction of new buildings or the renovation of existing structures, financing costs, professional service costs, and organizational costs such as the costs of conducting environmental impact and other studies. These bonds are secured by a tax allocation increment which represents an increase in the ad valorem tax revenues resulting from the redevelopment activities taking place in the TAD. In Georgia, the City of Atlanta, the City of East Point, Fulton County, and Clayton County, among others, have created TADS for the redevelopment of brownfields.

Property Tax Abatement

In addition to providing prospective purchasers with liability protection, most states provide property tax relief for brownfield developments. For example, the Georgia Hazardous Site Reuse and Redevelopment Act (O.C.G.A. § 12-8-200 et seq.) also provides preferential tax treatment for the cleanup of brownfield property. Purchasers of brownfield property who qualify for such limited liability become entitled to have their eligible brownfield costs "reimbursed" by a freeze on the ad valorem value of the property for a maximum of ten years or until the purchaser has recovered all of its eligible costs through a savings on property taxes. The fair market value of the property is thereby frozen at its "contaminated" value or the acquisition cost of the property, whichever is less. Costs eligible to be recovered include costs directly related to obtaining the limited liability and the cleanup of the property.

U.S. Environmental Protection Agency Brownfield Grants

The Brownfield Revitalization Act of 2002 authorizes EPA to award grant funds for the assessment and clean up of brownfield sites. These grant funds are classified as follows:

- Site assessment grants are used to fund a variety of pre-cleanup environmental activities including site assessment, inventory, characterization, prioritization, community outreach, and cleanup planning and design. Local governments are awarded up to $200,000 per jurisdiction or site for these purposes but EPA has discretion to increase the award to $350,000.

- Clean up grants provide up to $200,000 per site to fund cleanups conducted by cities, development agencies, non-profit groups, and similar entities at sites they own. A match of 20% (either of funds or in-kind services) is required.

- Revolving loan fund grants provide up to $1 million over five years per recipient to establish state or locally administered loan funds. Such revolving loan funds then make low- or no-interest loans for cleanup to developers. As much as 40% of the award to a particular jurisdiction can be used for cleanup grants at sites owned by sub-grantees and repayment of these sub-grants is not required. A 20% non-federal cost share (either in funds, labor, services, or materials) is required.

U.S. Department of Housing and Urban Development Financing

HUD offers three flexible sources of funding for brownfield redevelopment: HUD's Community Development Block Grant, the Section 108 loan guarantee program, and the Brownfields Economic Development Initiative. Eligible activities under these programs include economic development, land acquisition, site preparation and assessment, demolition and clearing of property, remediation, acquisition and construction of public facilities, and rehabilitation of public real property. More specifically:

- HUD's Community Development Block Grant Program awards funds to cities, urban counties, or states for the purpose of benefiting low and moderate income people; preventing or eliminating slums or blight; or addressing conditions that present a serious and immediate threat to the health and safety of the community. While brownfield redevelopment activities are eligible for such funds, these activities must be incorporated into local government plans through a consolidated plan or annual action plan.

- The Section 108 Loan Guarantee Program is an economic development loan guarantee program available to communities for financing economic development, public facilities, large scale physical development projects, and other brownfield redevelopment activities so long as they address the same goals of the Community Development Block Grant Program (benefit low and moderate income people; prevent or eliminate slums or blight; or address conditions that present a serious and immediate threat to the health and safety of the community). This program requires local governments to pledge their annual Community Development Block Grant funds, along with additional security, as collateral for the loan guarantee. There is a cap of five times the amount a community would be eligible under the Community Development Block Grant Program.

- The Brownfields Economic Development Initiative provides communities with funds for the clean-up and economic redevelopment of brownfields and works in conjunction with a Section 108 Loan Guarantee to enhance the financial viability of brownfield redevelopment projects. Such grant funds may be used for any eligible activity under the Section 108 Program, including property acquisition, economic development, public facilities and related activities, and are awarded on a competitive basis.

In addition, certain areas where brownfields are common have been designated as Empowerment Zones or Enterprise Communities by HUD. Such areas offer their own significant economic incentives that may be used for brownfield cleanup and redevelopment including federal grant funds, tax incentives, tax-exempt bond financing, Section 179 Expensing, the Work Opportunity Tax Credit, and the Welfare-to-Work Tax Credit.

Specialized Federal Agency Assistance

While EPA and HUD offer direct financial assistance to brownfield redevelopment efforts, other federal agencies may offer support and technical assistance to brownfield redevelopment that could result in cost savings. For example, the U.S. Department of Agriculture has programs within the Forest Service to provide technical assistance for open

space development and tree planting and programs to promote brownfield redevelopment in rural areas, including loan guarantees. The U.S. Department of Commerce has an Economic Development Administration that provides grants and funding for economically distressed areas and its National Oceanic and Atmospheric Administration provides technical and financial assistance for coastal resource protection and management. Other federal agencies may also provide additional information and technical assistance related to their areas of expertise.

Community Relations

Communities play an important role in brownfield development. Most environmental laws have community relations requirements that mandate participation by residents and elected officials in the process of investigating and remediating contaminated properties. For example, public meetings are held at various stages of the process to inform the public and to solicit comments. Oftentimes roads are closed during the cleanup so the city's participation in that process is key.

On the one hand, local residents are often the ones facing the blighted and underutilized property that could be a brownfield development, and are therefore the ones who would most likely benefit from such development. As such, they can form an important voice to regulators and elected officials encouraging the development, speeding its process and the required approvals, and overcoming unnecessary environmental restrictions. For example, we once handled a brownfield redevelopment in a minority neighborhood where the local residents repeatedly pleaded with the environmental agencies to keep the project moving. Local governments, likewise, can stand to gain from adding properties to the tax rolls, increased employment, and revitalization of neglected areas.

Unfortunately, however, local influence can sometimes impede as much as enhance brownfield redevelopment. We have seen local opposition form an obstacle to brownfield redevelopment in several different contexts:

- In some instances there is a misunderstanding about the nature and extent of cleanup—or, more accurately, the nature and extent of materials that will not be cleaned up—which in turn leads to skepticism about the developer and the state agency, creates concern over future risks to health and the environment, and creates the prospect of adversarial relationships that can only hurt, and sometimes kill, what would otherwise be a beneficial redevelopment. While environmental special interest groups have moderated somewhat over the past few years, they can still form a source of vocal and influential opposition to reduced cleanup standards that often create the foundation of brownfield economics.

- Communities can sometimes see the redevelopment as an opportunity for "free money," thinking that, since the old, abandoned property is going to be redeveloped by "rich developers," why not demand a number of community improvements (parks, bike paths, waterfront access, whatever) while they're at it. Most developers make such concessions, and there's nothing about brownfield redevelopment that necessarily compels any different outcome. The problem, though, is that the margin

on brownfield developments may be lower than the "safer" greenfield alternative in the suburbs, so there may not be as much freeboard available without swamping the boat.

- Finally, there can be thorny and very uncomfortable "environmental justice" issues in brownfield development. Although the topic is more complicated than it's common perception, the idea is that contaminated properties are disproportionately located in minority or economically depressed areas. As such, it is believed, contaminated areas, due to institutional racism or other forms of prejudice, get short shrift when it comes to environmental cleanup. That belief, for obvious reasons, plays right into the idea of mitigated cleanups for brownfield properties, which are also frequently located in minority or depressed areas.

Local governments can do a great deal to eliminate these kinds of concerns. The most important thing they can do is to inform themselves on the issues and help to mediate the various opposing forces inherent in such deals. Most lawyers advise against using words like "partnership" to describe public-private interactions, but there is a way in which the concept is *apropos*. There are enough common interests involved in most brownfield redevelopments that it should be possible for the common goals to overcome divergence in individual interests. The key is meaningful dialog that permits the mutual accommodations to be made.

Summary of the Small Business Liability Relief and Brownfields Revitalization Act

This document presents a summary of Public Law 107-118. It does not constitute a statement of EPA policy, interpretation, or guidance.

Background

- H.R. 2869 was introduced in the House of Representatives on September 10, 2001. It combined two bills (S. 350 and H.R. 1831) amending the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)
- H.R. 2869 passed the House by voice vote on 12/19/01 and the Senate by unanimous consent on 12/20/01
- H.R. 2869 incorporates S. 350, the "Brownfields Revitalization and Environmental Restoration Act of 2001", which passed the Senate on April 25, 2001 by a vote of 99-0. S. 350 contained three titles dealing with funding and liability for assessing and cleaning up contaminated properties. Title I codified and expanded EPA's current brownfields program by authorizing funding for assessment and cleanup of brownfields properties. Title II exempted from Superfund liability contiguous property owners, prospective purchasers, and clarified appropriate inquiry for innocent landowners. Title III authorized funding for State response programs and limited EPA's Superfund enforcement authority at sites cleaned up under a State response program. All three titles were combined into a single title in H.R. 2869.
- H.R. 2869 also incorporates H.R. 1831, the "Small Business Liability Protection Act", which passed the House on May 22, 2001 by a vote of 419-0. H.R. 1831 exempts de micromis contributors of hazardous substances and household, small business, and nonprofit generators of municipal solid waste from liability for Superfund response costs at National Priority List sites. Additionally, the bill provides for expedited settlements with certain persons based on a limited ability to pay.
- H.R. 2869 was signed into law by the President on January 11, 2002 and enacted as Public Law 107-118

Section 102. Small Business Liability Relief

- De Micromis Exemption
    - Exempts persons from Superfund response cost liability at National Priorities List sites as generators and transporters if the person can demonstrate that:

        - the total amount of the material containing hazardous substances they contributed was less than 110 gallons of liquid materials or 200 pounds of solid materials and
        - all or part of disposal, treatment, or transport occurred before April 1, 2001

    - Exceptions

        - materials contributed or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration
        - the person fails to comply with an information request
        - the person impedes or impeded, through action or inaction, a response action or natural resource restoration at the facility
        - the person has been convicted of a criminal violation for conduct to which the exemption would apply

- Contribution Actions - Private parties seeking contribution bear the burden of proof that the exemption does not apply
- Private party contribution plaintiffs are liable for costs and fees if the defendant is not liable under this exemption

- Municipal Solid Waste (MSW) Exemption
  - Exempts persons from Superfund response cost liability as generators for the disposal of municipal solid waste if the person is:

    - an owner, operator, or lessee of residential property
    - a business that employed on average not more than 100 individuals in the three years prior to notification of potential liability and is a 'small business concern' as defined by the Small Business Act
    - a nonprofit organization that employed not more than 100 individuals during the preceding year at the location from which the MSW was generated

  - Exceptions

    - waste contributes or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration
    - person fails to comply with an information request
    - person impedes or impeded, through action or inaction, a response action or natural resource restoration at the facility

  - Definition of Municipal Solid Waste

    - waste material generated by a household; and
    waste material generated by a commercial, industrial, or institutional entity, to the extent that the waste material–

      - is essentially the same as waste normally generated by a household
      - is collected and disposed of with other MSW as part of normal MSW collection; and
      - contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste generated by a typical single family household

    - examples – food and yard waste, paper, appliances, consumer product packaging, elementary and secondary school science lab waste, household hazardous waste
    - exclusions – combustion ash from resource recovery facilities or municipal incinerators and waste material from manufacturing and processing operations that is not the same as household waste

  - Burden of Proof - To establish applicability of MSW exemption in 107 and 113 actions

    - Private party bears the burden of establishing exemption does not apply for waste disposed of after April 1, 2001
    - Private parties and government bear the burden of establishing exemption does not apply for waste disposed of before April 1, 2001

  - Bars contribution actions by a party other than a Federal, State, or local government, against owners, operators, and lessees of residential property that generated MSW

    - Private party contribution plaintiffs are liable for costs and fees if the defendant is not liable under this exemption
- Expedited Settlements based on Limited Ability to Pay
    - Provides for conditional expedited settlements with eligible persons that demonstrate an inability or limited ability to pay response costs based on whether the settlor can pay and still maintain basic business operations, includes consideration of financial condition and ability to raise revenues
    - Includes government notification requirements and provisions requiring settlors to cooperate with EPA

Section 103. Effect on Concluded Actions

- The amendments made by the small business title shall have no effect on settlements lodged or judgments issued by a federal court, or administrative settlements or administrative orders entered into or issued by the United States or a State, before the date of enactment

TITLE II. BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001

Subtitle A. Brownfields Revitalization Funding
Section 211. Brownfields Revitalization Funding

- Authorizes up to $200 million per year for brownfields assessment and cleanup to carry out new section 104(k). Includes $50 million per year or 25% of amount appropriated to carry out 104(k), for brownfields with petroleum contamination.
- Definition of Brownfields Site: 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
- Additions for purposes of section 104(k)

    - land contaminated by petroleum or petroleum products
    - land contaminated by a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802)
    - mine-scarred land

- Exclusions

    - subject to a planned or ongoing CERCLA removal action
    - listed or proposed for listing on the National Priorities List
    - subject to a unilateral administrative order, court order, administrative order on consent, or consent decree under CERCLA
    - subject of a unilateral administrative order, court order, administrative order on consent, consent decree, or permit under RCRA, CWA, TSCA, or SWDA
    - subject to corrective action under RCRA 3004(u) or 3008(h) to which a corrective action permit or order has been issued or modified requiring the implementation of corrective measures
    - land disposal units with closure notification submitted and closure plan or permit;
    - subject to the jurisdiction, custody, or control of federal government
    - with PCB contamination subject to remediation under TSCA
    - which have received assistance from the Leaking Underground Storage Tank for a response activity

- Provides authority to include some otherwise excluded sites on a site-by-site basis
- Eligible entities for brownfields funding include States, Tribes, local governments, land clearance authorities, regional councils, redevelopment agencies and other quasi-governmental entities created by States or local governments
- Imposes significant restrictions on charging administrative costs to grants
- Brownfields site characterization and assessment

    - authorizes grants of up to $200,000 per sites to eligible entities to inventory, characterize, assess and conduct planning at brownfields sites
    - authorizes targeted site assessments at brownfields sites
    - National Contingency Plan (NCP) requirements may be imposed only when relevant and appropriate to the program

- Brownfields remediation

    - authorizes grants of up to $1 million to eligible entities to capitalize revolving loan funds to clean up brownfields
    - authorizes grants of up to $200,000 per site to eligible entities or non-profit organizations to clean up brownfields owned by the grant recipient
    - grants generally require a 20% match
    - construction, alteration and repair work funded all or in part with grant funds is subject to Davis Bacon Act
    - NCP requirements may be imposed only when relevant and appropriate to the program

- Brownfields program

    - establishes program to provide training, research and technical assistance to facilitate brownfields assessment and cleanup
    - limited to 15% of amount appropriated to carry out 104(k)

Subtitle B. Brownfields Liability Clarifications Section 221. Contiguous Properties

- Exempts from owner or operator liability persons that own land contaminated solely by a release from contiguous, or similarly situated property owned by someone else, if the person:

    - did not cause or contribute to the release or threatened release
    - is not potentially liable or affiliated with any other person potentially liable
    - exercises appropriate care in respect to the release
    - provides full cooperation, assistance, and access to persons authorized to undertake the response action and natural resource restoration
    - complies with all land use controls and does not impede the performance of any institutional controls
    - complies with all information requests
    - provides all the legally required notices regarding releases of hazardous substances
    - conducted all appropriate inquiry at time of purchase and did not know or have reason to know of contamination

Section 222. Prospective Purchasers and Windfall Liens

- Exempts bona fide prospective purchasers (and their tenants) from owner or operator liability so long as the person does not impede the performance of a response action or natural resource restoration

- Definition of a Bona Fide Prospective Purchaser

    - all disposal took place before the date of purchase
    - person made all appropriate inquiry
    - person exercises appropriate care with respect to any release
    - provides full cooperation, assistance, and access to persons authorized to undertake response actions or natural resource restoration
    - complies with land use restrictions and does not impede performance of institutional controls
    - complies with all information requests
    - provides all legally required notices regarding releases of hazardous substances
    - person is not potentially liable or affiliated with any other person potentially liable

- Provides the US with a lien on the property if the US has unrecovered response costs and the response action increases the fair market value of the facility

Section 223. Innocent Landowners

- Clarifies what actions landowners must take to satisfy the "all appropriate inquiries" requirement of the defense
- Directs EPA to promulgate within 2 years regulations establishing standards and practices for satisfying the all appropriate inquiries requirements
- Until EPA issues the required regulations two standards apply depending on the date the property was purchased
    1. Prior to May 31, 1997 - a court shall consider specialized knowledge of the defendant, relationship of purchase price to value of uncontaminated property, commonly known information, obviousness of contamination, ability of defendant to detect contamination by appropriate inspection
    2. After May 31, 1997 - ASTM "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process"
- In the case of a facility purchased for residential use by a person who is not a government or commercial entity, a facility inspection and a title search satisfy the appropriate inquiry requirement

Subtitle C. State Response Programs Section 231. State Response Programs

- Authorizes $50 million per year for grants to assist States and tribes in the development of State response programs
- A State may be awarded funds if it is a party to a memorandum of agreement with EPA for its voluntary response program, or if the State includes, or is working toward including, the following elements in its program:

    - timely survey and inventory of brownfields sites
    - oversight and enforcement authorities to ensure protection of human health and environment
    - meaningful public participation
    - mechanism for approval of a cleanup plan and certification that response is complete

- Restricts Federal administrative or judicial enforcement action under 106(a) or cost recovery actions under 107(a) at any eligible response site at which there is a release, or threatened release, of a CERCLA-covered substance and at which a person is conducting a response in compliance with a State program that specifically governs response actions for protection of human health and the environment
- This limitation applies only to response actions conducted after February 15, 2001

- "Eligible response site" is a brownfields site with the following additions:

  - certain LUST sites
  - certain sites covered by RCRA, CWA, TSCA, or SDWA excluded from the definition of a brownfield site, if, as determined on a site-by-site basis, findings are made that not taking enforcement will still limitations on enforcement are appropriate and will (1) protect public health and the environment and (2) promote economic development or open space

- The following sites are not eligible response sites, and federal enforcement or cost recovery restrictions are not applicable:

  - facilities at which Federal preliminary assessments or site inspections are conducted and are qualified for listing on the NPL
  - facilities determined to warrant particular consideration, as identified by regulation -- e.g., threats to a drinking water aquifer or a sensitive ecosystem

- Federal enforcement actions may be brought at an eligible response site in the following cases (provided certain findings are made, generally related to risk at the site):

  - the State asks for Federal involvement
  - contamination has migrated, or will migrate, across a State line or onto Federal property
  - considering response actions already taken, a release or threatened release may present an imminent and substantial endangerment to human health or the environment
  - new information, not in the record for the cleanup, indicates a threat requiring further remediation

- Administrative requirements

  – limitations only apply in States that publicly maintain a list of sites with response actions under the State response program
  – State must be notified of EPA enforcement action that may be otherwise barred and has 48 hours to reply
  – provisions exist for taking immediate Federal action, without awaiting State reply, under certain circumstances
  – EPA must report to Congress 90 days after initiation of enforcement action that may be otherwise barred

Section 232. Additions to National Priorities List

- Requires deferral of NPL listing if State or other party is cleaning up a site under a State program or if the State is pursuing a cleanup agreement
- President may list a deferred site after one year if State is not making reasonable progress toward completing a response action

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