



# Breaking Barriers to Brownfields Redevelopment

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The term "brownfield" is used generally to describe abandoned or under-used industrial or commercial property where expansion or redevelopment is complicated by real or perceived environmental contamination. This definition is sufficiently broad to include an estimated 20,000 to 450,000 privately held and publicly owned properties throughout the United States.

Unquestionably, redevelopment and reuse of these sites would benefit both the economy and the environment. Redevelopment would bring jobs to local communities and economic growth to urban areas while remediating contaminated sites and allowing "greenfields" to remain untouched. Yet, potential liability for environmental contamination, uncertainty associated with both known and unknown contamination, and the lending community's hesitance to finance the development of brownfield sites frequently have been cited as impediments to redevelopment.

In response to such concerns, federal and state governments have taken steps to reduce the barriers to brownfields revitalization through legislation and agency initiatives. In fact, government response to the brownfields problem has been so widespread that one must consider the true extent to which actual, rather than perceived, impediments to purchasing, financing, and developing brownfields still exist.

## Environmental liability

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in response to public concern over the effects of hazardous waste disposal. CERCLA has been interpreted by the courts to provide, with few exceptions, that every party that owned or operated property at the time that

hazardous substances were released from the property into the environment, and every party currently owning contaminated property, are strictly and jointly-and-severally liable for the remediation of the resultant contamination.

In addition, because CERCLA has retroactive reach, a party may be held liable for pollution that took place before CERCLA's enactment, even though the polluting activities may have been legal at the time they took place. In the wake of CERCLA, many states enacted their own laws containing liability provisions similar to those contained in CERCLA in an effort to enforce environmental cleanup. Thus, even if an owner or operator of a brownfield is not liable under CERCLA, it may be legally responsible for cleanup under its state counterpart.

### **Cleanup uncertainties**

Uncertainties regarding a cleanup's scope, length, and cost are widely believed to be another barrier to brownfield redevelopment. First, because there are no national soil and groundwater cleanup standards, the levels of contamination applicable to a brownfield site will vary depending upon the location. No specific remedial standards exist in many states, and regulatory authorities must determine cleanup criteria through a site-specific risk assessment. Because risk assessment procedures vary among the states, uncertainty concerning how to assess a site and what cleanup standards will be imposed may result. Additionally, there is no assurance that once a cleanup standard is arrived at, the state agency will not adopt a more stringent remediation standard in the future.

Moreover, the investigation and remediation of contamination can be a lengthy process, dependent upon consultants' schedules, laboratory delays, slow agency turnaround time, and weather conditions. Delays, in turn, are costly. It is not uncommon for cleanup costs to total hundreds of thousands of dollars and often a great deal more. Perhaps even more disconcerting to a potential redeveloper is the possibility that during, or subsequent to, development, unforeseen contamination will be discovered for which the redeveloper may be held liable and which will delay or even halt redevelopment efforts.

### **Investing and lending issues**

Fear of potential liability and the uncertainties associated with environmental cleanup are believed to have negatively affected the ability of potential redevelopers to obtain financing. Concern about potential liability under CERCLA and its state counterparts may have resulted in fewer loans for the purchase and/or redevelopment of contaminated industrial or commercial facilities. That same concern also may have caused lenders to limit loan-making to companies with substantial assets and to conduct more detailed pre-loan investigations. These safeguards, in turn, may have increased transaction costs.

However, both the lending community and insurance companies are beginning to initiate programs associated with

redeveloping brownfields. Large insurance companies, for example, now are offering lenders environmental liability policies to help defray the risks associated with the costs in these brownfield redevelopment projects.

The U.S. Environmental Protection Agency (EPA) is attempting to break the brownfields inertia through administrative initiatives designed to encourage both cleanup and economic redevelopment of contaminated properties.

Early last year, EPA revealed its Brownfields Economic Redevelopment Initiative and described it as a tool to empower state and local governments to work cooperatively to prevent, assess, clean up, and reuse brownfields. On January 25, 1995, EPA Administrator Carol Browner announced a Brownfields Action Agenda, which outlines EPA's activities and future plans to help states and localities implement and realize the benefits of the Brownfields initiative.

The efforts outlined in the Brownfields Action Agenda may be grouped into four broad categories: brownfields pilots, clarification of liability issues, partnerships and outreach, and job development and training.

### **Brownfields pilots**

Through the Brownfields pilot program, EPA will fund at least 50 pilots during 1995 and 1996 at up to \$200,000 each to support creative two-year demonstrations of assessment, cleanup, and redevelopment solutions. To date, EPA-funded projects are under way or have been approved at 40 sites, including New York City and Trenton.

In July 1995, EPA selected Trenton for a Brownfields pilot project. A city of 89,000 people, Trenton was a prominent manufacturing center in the 19th century. As its manufacturing industry declined, Trenton was left with a host of abandoned industrial buildings that now pose significant environmental threats. Since July, Trenton has formed a partnership with a private, non-profit community redevelopment organization and has established working relationships with the New Jersey Department of Environmental Protection, the New Jersey Institute of Technology, Rutgers University, and local community development corporations to address impediments to brownfields redevelopment.

EPA targeted specific liability issues such as prospective purchaser liability, liability of owners of property containing contaminated aquifers, lender liability, municipal acquisition liability, land use in the CERCLA remedy selection process, and lender liability at sites with underground storage tanks as issues to be addressed by the Brownfields initiative.

### **Purchaser agreements**

If a pre-purchase investigation reveals contamination or suspected contamination, a prospective purchaser may

avoid liability as an owner by entering an agreement with EPA before purchasing the property. Under such an agreement, the prospective buyer offers assistance in the cleanup effort in exchange for a covenant from EPA not to sue and contribution protection against other potentially responsible parties.

EPA last July published a guidance document addressing agreements with prospective purchasers of brownfields. This guidance essentially directs EPA regional officers to enter into flexible and fast-track agreements not to sue buyers of polluted property for contamination that existed prior to acquisition. The document lists criteria by which EPA will consider entering covenants not to sue under CERCLA, describes the process by which these agreements may be entered, and includes a model agreement.

EPA emphasized its commitment to building partnerships with states, cities and community representatives to develop strategies for promoting public participation and community involvement in brownfields decision-making. EPA staff, local contacts, and community colleges have established a program to develop long-term plans to foster work force development through environmental education and to allow local residents an opportunity to qualify for job developed as a result of brownfields efforts.

In addition to these efforts, since the inception of the Brownfields initiative, EPA has removed more than 27,000 sites from the Comprehensive Environmental Response, Compensation and Liability Information Systems (CERCLIS) inventory, a computer data base that contains a list of properties once considered for possible attention under Superfund. Even though many of the properties listed in the CERCLIS inventory, in fact, were not contaminated or were being cleaned up under state programs, their continued presence on the CERCLIS inventory make prospective purchasers and developers reticent to bid, and lenders reluctant to loan money on the sites.

The Superfund reform bill (Reform of Superfund Act, HR 2500), introduced in October 1995, addresses both retroactive liability and brownfields redevelopment.

President Clinton addressed this issue in New Jersey recently, stating his recent tax proposal will allow prospective purchasers an immediate tax deduction for environmental cleanup initiatives related to brownfield redevelopment in depressed economic areas. This would allow cleanup costs incurred by purchasers to be immediately depreciated.

U.S. Rep. William Coyne (D-Pa.) on Jan. 4 introduced the Brownfields Redevelopment Act of 1996 (HR 2846), which would amend tax laws to allow a credit for the cleanup of certain contaminated industrial sites. The amendment would allow the credit only for sites that have ben unproductive for at least one year and would be dependent on participation in an environmental remediation credit plan for redevelopment.

The bill also would allow EPA to issue tax-exempt redevelopment bonds to local governments for the costs of environmental remediation. The bill is before the House Ways and Means Committee.

## **States' response**

More than half the states have adopted legislation and/or programs in an effort to mitigate concerns raised by brownfields redevelopment and to encourage revitalization of brownfields.

While New Jersey's voluntary cleanup program addresses some concerns of prospective developers of brownfield sites, it does not provide any assurance to a party who has successfully completed a site remediation that the party will not be held responsible for prior contamination of the property. The "no further action" letter issued by the state is not a release of liability. Thus, under New Jersey's program, a redeveloper who has remediated contaminated property may remain exposed to liability for pre-existing contamination subsequently discovered at the site.

The movement by states to promote brownfields remediation and redevelopment by easing, focusing, and streamlining agency efforts has gained momentum. In the past several years, states have adopted a variety of laws to further the goal of returning brownfields to productive use. States have made efforts to ease concerns over potential liability for owners, prospective, purchasers, and lenders. In addition, certain states have passed laws granting tax and other regulatory incentives for brownfield redevelopment.

Many states have passed their own legislation to limit the liability of banks and other lenders for costs associated with cleaning up contaminated properties when borrowers default. For example, in May 1993, New Jersey amended its Spill compensation and Control Act to allow lenders to foreclose on property and take any actions necessary to protect the property's value prior to sale without incurring liability under the act for past environmental contamination at the site. Under the amendment, a lender is shielded from liability for past releases as long as it did not actively participate in the management of the facility prior to foreclosing on it. Other states have enacted similar laws limiting the environmental liability of lenders.

## **Tax incentive laws**

Gov. Whitman on Jan. 10 signed into law legislation that provides an economic incentive for business to restore contaminated properties to their full commercial or industrial use. The Environmental Opportunity Zone Act authorizes municipalities to designate certain areas as "environmental opportunity zones." Properties in these areas are eligible for a 10-year property tax exemption in scaled amounts on the condition that the site is cleaned up and returned to commercial or industrial use.

Payments in lieu of tax payment will begin the year following the execution of a memorandum of agreement or an administrative consent order with DEP at zero percent and increase by 10 percent each year during the 10-year exemption period.

The act also grants certain regulatory incentives. For example, new owners will be eligible to receive low-interest loans from the state for remediation, expedited DEP review of remedial action work plans, and an exemption from the requirement to establish a remediation funding source as required under the Industrial Site Recovery Act.

Both the federal and state governments have recognized that the obstacles to brownfields redevelopment and efficient environmental cleanup must be removed, or at least substantially reduced, to promote growth in urban communities and the reuse of abandoned or under-used commercial and industrial properties. Agency initiatives, coupled with legislative efforts, have addressed concerns such as the potential liability for environmental contamination, the uncertainties associated with the investigation and remediation of contamination, and the hesitance of the investing and lending communities to participate in projects involving brownfields. Through these efforts, the federal and state governments are attempting the dual goals of strengthening the economy by returning brownfields to productive use and achieving a cleaner environment.

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