



Freeborn & Peters LLP

Brownfields - No Longer a Dirty Word

To a greater extent than ever, developers are tackling complicated projects involving Brownfields sites. In fact, demand for environmentally "compromised" properties is higher than ever and environmental issues that would have killed a deal ten years ago are now being routinely managed in the normal course of development. Several factors have led to this shift, including:

- (i) the growing availability of insurance coverage for purchasers and lenders covering various environmental liabilities;
- (ii) quicker and more flexible responses to requests for action from environmental regulatory agencies;
- (iii) a greater interest in urban living; and
- (iv) more plentiful state and local assistance for clean-up and other remediation efforts.

Historically, one of the biggest obstacles to Brownfields redevelopment has been the discomfort of lenders and investors with the virtually unlimited liability that is attached to properties having existing environmental problems. Recently, however, insurance products have been created that remove environmental liabilities from the analysis of whether a development or redevelopment project can be feasibly accomplished. While the extent of coverage varies widely under these types of policies, the insurance carrier essentially agrees under these policies (after the payment of an insurance premium), to pay the costs of any future, governmentally required clean-up related to an existing environmental condition (or those clean-up costs exceeding a certain threshold). With environmental liability capped or removed in this manner, developers can turn their focus away from the management of environmental issues to other aspects of their development projects.

In almost as significant a development obstacle, regulatory agencies have historically taken an unduly long time to evaluate the "cleanliness" of Brownfields sites or the state of those properties' compliance with existing environmental law. In the real estate business, "time is money" and the slow pace of governmental action was having a chilling effect on the interest of developers in dealing with compromised properties. Recently, however, there has been a concerted effort by government agencies to process site evaluations in a more timely manner. In addition, many states have applied flexible standards for evaluating the presence of Hazardous Material on various sites. The application of these standards depend on a variety of factors including the historical use of the site, its physical location relative to other uses and its planned use after development. As an example, the State of Illinois employs a Tiered Approach to Corrective Action (commonly known as "TACO") in assessing compliance and clean-up options. In applying TACO, for example, contaminated manufacturing and other commercial uses require less clean-up than low density residential uses. Even higher density residential uses can take advantage of TACO's flexibility by, for example, building a parking deck over contaminated soil as a containment process rather than removing all contaminated material from the entire site.

The disappearing stigma associated with environmentally challenged properties has intensified a greater interest in urban living. This trend, in turn, encourages developers and regulatory agencies to find solutions for the redevelopment of remaining urban Brownfields to satisfy the high demand for more housing. The redevelopment of urban centers has had a significant social impact on affected cities resulting in falling crime rates, improved public schools, development of new means of commuting and a refocus of municipal attention on improving local infrastructure. The greatest challenge experienced by urban developers is no longer addressing the complexities of environmental law but, instead, simply finding well located development properties.

Finally, municipalities have found creative ways to contribute, directly or indirectly, toward the cost of cleaning up environmentally compromised sites. The willingness of towns and cities to contribute toward these costs is a reflection of the fact that redevelopment of unused sites benefits municipalities by bringing new life to blighted areas and by adding new taxpayers to the tax rolls. Tax increment financing and enterprise zones are two major financing tools used by municipalities as relatively innovative strategies for luring private investment. At the state level, the Illinois Environmental Protection Agency (the "IEPA")

administers various programs designed to put Brownfields sites into use. Though geared toward municipalities, these include (i) the municipal Brownfields redevelopment grant program (ii) the use of Brownfields representatives who help municipalities shepherd issues through the IEPA and (iii) state assistance with site assessment for municipalities.

For most of the last 10 years, developers and their advisors have steadily chipped away at the obstacles standing in the way of the redevelopment of real estate having environmental challenges. More than ever before, the term "Brownfields" is no longer a dirty word.

* * *

If you have any questions or would like assistance regarding the matters discussed above, please contact the editors of *Development News*:

Richard Traub, Esq.
312.360.6605
rtraub@freebornpeters.com

Michael Moynihan, Esq.
312.360.6419
mmoynihan@freebornpeters.com

CHICAGO OFFICE

312.360.6000 ph • 312.360.6250 fx

SPRINGFIELD OFFICE

217.535.1060 ph • 217.535.1069 fx

www.freebornpeters.com