



LESSONS LEARNED:TM **Real Estate Acquisition** **OBSERVATIONS AND LESSONS FROM THE SCHOOL OF EXPERIENCE**

Developing Brownfield Properties

Developers and financial institutions have historically avoided involvement with projects involving redevelopment of contaminated properties because of the concern of being held responsible for cleanup costs. Achieving success in the development of contaminated properties is the subject of this installment of Lessons Learned.

The Brownfields Property Reuse Act was created in 1997 to reduce barriers associated with the development of contaminated property. Brownfields are defined as “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”. Typical brownfield properties are those that are abandoned or idle that are known or suspected of being contaminated, and whose redevelopment is impaired due to a prospective developer’s potential liability for cleanup costs.

Benefits of brownfield redevelopment programs may provide:

- Reuse of property that typically is vacant and visually unpleasing
- Redevelopment grant money (as available)
- Tax benefits for redevelopment
- Liability protection (if not party responsible for contamination)
- Regulatory cleanup flexibility

There are many issues that must be addressed prior to redeveloping brownfield sites including legal issues, costs, financing, numerous federal, state, and local environmental policies, limited demand for redeveloped sites, and competition from “clean” sites. The primary consideration in redeveloping a brownfield site hinges on the value of the property after it has been remediated.

Most states have passed laws which provide mechanisms whereby developers can redevelop contaminated property while being protected from liability for full cleanup of the property. Potential purchasers and developers of brownfield sites who have no connection with the site’s contamination (including lenders) are encouraged under these new laws to provide capital and labor to remediate a brownfield site to a predetermined level without the risk of liability for problems they did not create.

State environmental agencies require the developer to enter into a Brownfields Agreement, in which the developer accepts specific assessment and remediation responsibilities. This is the mechanism where a party can negotiate reduced cleanup levels and receive liability protection. In the agreement, the developer is responsible to clean up the property only to the extent needed to make it safe for its intended use. Furthermore, cleanup is limited to specific areas identified in the agreement. This liability protection is also extended to parties representing the developer, future owners of the property, persons who develop or occupy the property, successors or assigns of any of the parties associated with the development of the property, and lenders that provide financing for remediation and redevelopment. Land use restrictions are generally used in support of less-demanding remediation levels.

If land use restrictions are specified in the brownfields agreement, a land use restriction update (LURU) must be conducted annually to verify that the restrictions remain in place.

The following guidelines provide a firm foundation when developing a brownfield site:

- Choose an environmental consultant experienced with brownfield redevelopment issues, and familiar with the types of contaminants that have impacted the site.
- Investigate the brownfield redevelopment program or voluntary cleanup program for your state. These state programs vary as to legal, technical, and financial support.
- Develop a plan to clean up the site with well-defined goals and objectives and then present your plan to the state as the springboard for your site’s brownfield agreement.
- Use “land use” restrictions when applicable instead of performing costly assessment and remediation.
- Develop a plan to provide an annual LURU (if applicable).

Once development begins, clean up only what is outlined in your agreement. Voluntarily assessing or remediating other contaminated portions of the site can expose you to unnecessary liability.

The many changes that have reduced the risk of developing contaminated sites warrant the reconsideration of properties that were once unattractive. These include former industrial sites, closed military bases and commercial properties. It’s a win-win situation: both your community and your bottom line will benefit from the development of brownfield sites.