

BROWNFIELDS: A BOOMING BUT REGIONAL MARKETPLACE

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Innovative approaches to redevelopment incentives will expand a market with tremendous upside potential.

Throughout the country, specifically in urban areas all but abandoned by manufacturing industries years ago, a huge inventory of properties has been stockpiled by private owners, financial institutions, corporations, and municipalities. These parcels of real estate are popularly known as "brownfields" which are defined by the Environmental Protection Agency (EPA) as "abandoned, idled, or under-used industrial and commercial properties where real or perceived contamination complicates expansion or redevelopment." Their potential utility, however, is much greater than the name would suggest. The contamination associated with "brownfields" will not trigger a cleanup pursuant to the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),¹ but there are other real barriers to development.

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Brownfields vary in size and character from former gas stations or dry cleaning operations to multi-acre industrial complexes. Many are situated in prime real estate locations. During the current period of economic prosperity, developers, anxious to return such land to profitable use, are seeking access to ready sources of capital. Such enthusiasm is, however, tempered by concerns over huge cleanup bills, the potential for uncapped liability, and insufficient resources or incentives to overcome the stigmas of developing environmentally impaired properties.² These factors translate into missed opportunities for local communities to generate desperately needed tax revenue and to create new jobs.

The owner of a brownfield site is confronted by a diverse number of forces in the impaired property marketplace. The components of finance, insurance, governmental regulation, and public interest form a murky blend leading many site owners to withhold their land from the market or abandon it entirely. The latter decision has left many municipalities and financial institutions with vacant properties in their portfolios that they are also hesitant to develop.

Over the past few years, a prosperous market for impaired properties has developed in those regions where there is a recognition among stakeholders that developers must be provided with liability protection, flexibility in cleanup standards, and a variety of monetary incentives to return such parcels, and the communities they inhabit, to economic viability.³ That market would collapse, however, without the cooperation of financing sources such as banks, independent lenders, private investors, and state and federal governmental programs. To ensure their continued commitment to this market, these lending sources must be provided with reliable cost projections and accurate assessments of liability by developers. The insurance industry, regulatory authorities, and local community groups are beginning to network in an effort to create such certainty, and with it, a profitable and necessary marketplace.

The Market Network:

Shared goals of economic revitalization pave the way to project development, financing, and support.

Insurance Industry. One important component for establishing the necessary certainty required by funding sources is the availability of affordable insurance products specifically tailored to meet the needs of those undertaking environmentally impaired projects. One such product, is a type of "stop-loss" policy that can cap cleanup costs at a set level. This is accomplished by insuring against a particular remediation project's cost overruns caused by certain "pollution conditions" as set forth in the policy.

The Kemper Insurance Companies recently launched the Kemper Environmental division to market this type of policy to contractors, property owners, private investors, and lending institutions. Kemper Environmental's Brownfields Restoration and Development Policy is a claims-made and reported policy. It allows the party undertaking remediation efforts to secure more lucrative financing because the costs of cleanups can be fixed. The policy contains provisions that limit the amount of legal defense expense the insured is responsible for paying in connection with claims and environmental cleanup costs. With the increased certainty added to the redevelopment project by this insurance product, a borrower

can more effectively leverage its attractiveness to potential financial backers.

Regulatory Authorities. Although insurance products address some of the uncertainties involved in the restoration of environmentally impaired properties, the necessary involvement of regulatory agencies in the process can force a brownfields site owner to permanently mothball a site.⁴ Regulators can use their statutorily mandated authority to impose more stringent cleanup standards at any point in a project and may exercise their authority to delay commencement of remediation efforts, thus rendering a developer's cost projections useless. Site remediation can be viewed as a game with a moving target. Whether such a perception is real or not, most of the uncertainties associated with regulatory oversight stem from the complex regulatory framework most owners, borrowers, or developers simply do not have the inclination or resources to fully comprehend.⁵

Just as the insurance industry has come to recognize a viable brownfields marketplace, state and federal regulatory authorities have also awakened to the advantages of reclaiming brownfields and have recently begun to shed their adversarial demeanor in favor of a more supportive role in the overall process.

New Jersey's Brownfield and Contaminated Site Remediation Act,⁶ Pennsylvania's Land Recycling Program⁷ and recent amendments to Georgia's Site Reuse and Redevelopment Act⁸ are just a few examples of how state regulatory authorities are seeking to assist brownfields redevelopment efforts. New Jersey's new law, for example, provides tax breaks and liability protections for developers. The state's Department of Environmental Protection reacted to the legislation by proposing rule changes in July 1998 that would amend the state's remediation program rules to encourage acquisition, remediation, and development of former commercial and industrial sites.⁹ The Pennsylvania brownfield program provides grants and loans to pay for remediation. Once completed, the state will enter into a covenant not to sue the remediator. In addition, certain redevelopment remedies may be undertaken without approval of the state's environmental agency. Both New Jersey and Pennsylvania have programs with specific rules for contaminated sites in recognized economic "opportunity" zones. Massachusetts has become the latest state to become proactively

involved in this market. On August 3, 1998, Acting Governor Paul Celluci signed a bill to accelerate the cleanup and reuse of 6,100 contaminated industrial sites across the state.¹⁰

In a bold and well supported move, Massachusetts will limit the liability for innocent parties that purchase and clean up impaired properties, and it will stimulate that revitalization through tax breaks, loans, and grants for cleanup activities—a comprehensive approach many other jurisdictions currently lack. In fact, Massachusetts will create a program to underwrite \$15 million in loans targeted at brownfields reclamations, and will have access to additional grant monies for economically distressed sections of the state.

On a national level, the EPA instituted its Brownfields Economic Redevelopment Initiative to promote a unified effort by stakeholders to clean up contaminated parcels so they could be reused.¹¹ In May of 1997, the Clinton Administration announced its Brownfields National Partnership Action Agenda¹² to enhance partnerships among governments, communities, businesses, and non-governmental organizations to address brownfields issues.¹³ In March of this year, 16 cities were designated as showcase communities to receive federal grants to clean up brownfields¹⁴—a \$28 million outgrowth of the Partnership Agenda which plans to reach a goal of 5,000 brownfields cleanups with \$300 million in investment from various federal agencies.¹⁵

Community Involvement. These programs are catching the attention of developers throughout the country. Their zeal could be kept in check if private environmental groups continue to push for implementation of the highest cleanup levels rather than allowing for cleanup standard flexibility.¹⁶ The latter approach will generate more cost effective cleanup goals and facilitate additional brownfields projects. This approach, known as risk-based corrective action, is viewed as important in facilitating real estate transactions and redevelopment of industrial properties. EPA's Resource Conservation and Recovery Act (RCRA) Brownfield Prevention Initiatives identified the need for risk-based decision making to facilitate reuse of property subject to RCRA.¹⁷

To satisfy the concerns community groups have with potential health risks posed by brownfields, projects should include technical advisors retained to review projects and keep local residents informed. Although the retention of experts

will be an additional cost, their involvement will help sustain public support for the project and potentially save developers/owners huge sums on remediation expenses if the cleanup project is limited to the site's intended end use.

The New York Experience

The main hurdle is the creation of easy, affordable and understandable access to these market forces so that owners and developers can convince funding sources that their redevelopment projects will be sound investments. The experience of redevelopment in New York supplies a good argument for limiting liability and easing access to an industry that has blossomed around brownfields. New York State committed \$200 million to clean brownfields in its 1996 Clean Water/Clean Air Bond Act.¹⁸ These monies are accessible for projects that will remediate sites to a level as stringent as that set for Federal Superfund sites. This was a condition lobbying groups insisted upon in exchange for their backing of the bond act.

Municipalities that own brownfields sites in New York view such aid as highly restrictive since cleanups could still take years, cost huge sums of money, and leave the developer, owner, borrower, or lender open to unknown liability once the rehabilitated property is sold. Public officials in Suffolk County, New York, for example, confronted these very issues when they sought to utilize funds from the bond act to refurbish the former Old Harbor Marine in Lindenhurst, New York.¹⁹

The Old Harbor Marine site is typical of many brownfields. It lays barren, surrounded by barbed wire at the end of a street in a residential community. The parcel is believed to contain high concentrations of metal, including lead, and a possible leaking petroleum storage tank. To alleviate the town of such blight, Suffolk officials have sought to use the bond act to clean the site and put it back into positive economic use. The Old Harbor Marine is only one of hundreds of brownfield sites on Long Island; however, rehabilitation of this one parcel is not part of any wider initiative.²⁰ The uncertainties not addressed by New York lawmakers and the fears of special interest groups have forced site owners, such as Suffolk County, to approach redevelopment only on a cautious and limited experimental basis.²¹

Although the bond act does limit the liability of municipalities undertaking a cleanup that meets state requirements and the newly established

voluntary cleanup program provides added initiatives, the limited protections afforded have severely curtailed redevelopment efforts. There are mechanisms available, already in wide use throughout the country, that could pave the way in New York for passage of innovative brownfields legislation. That mechanism would have at its focal point the ability to unify the forces dedicated to brownfields redevelopment in the financial, insurance, and regulatory fields. In addition, the mechanism would function to create access to environmental scientists and financial consultants who are focusing on the impaired property marketplace. This mechanism is the nonprofit corporation.

Creating a Brownfields Nonprofit Corporation

In February 1998, the Development Fund, a 501(c)(3) nonprofit organization that develops new financing vehicles to attract capital from private financial institutions and corporations for community purposes, released Phase One of its study "Financing Initiative for Environmental Restoration" (FIER). The Fund launched FIER to create an innovative new financing intermediary to recycle contaminated lands and return them to productive use. FIER's concept was to explore the creation of a new financing source to access private-sector capital for the cleanup and redevelopment of brownfields and other "impaired lands." As part of its study, FIER analyzed private financing initiatives currently in the brownfield marketplace. The study focused upon thirteen organizations — a mix of for-profit and nonprofit initiatives that target, in various ways, the characterization/assessment phase and the financing of the remediation process to clean the property.

The findings made by the FIER project provide a groundwork for establishment of similar types of corporations in states like New York where wider brownfields initiatives are needed. Such corporations could alleviate the concerns of lobbyists and politicians reluctant to pass laws that allow for cleanup standard flexibility and liability limitations. The hypothetical nonprofit corporation described subsequently demonstrates how such an organization can capitalize upon private and public funding sources, liability limitations, and flexible cleanup standards without abusing such

privileges, and open the door to full-scale redevelopment projects.

A for-profit company could, of course, achieve equal success in this area, but it is more likely to be perceived as a business entity. A nonprofit, on the other hand, can attract charitable funding and allow for tax advantages in the case of land donations. Most importantly, a nonprofit entity affords the local community an opportunity for direct involvement with the project.²² The objective is to reclaim the site for the community and to make it a part of the overall effort.

New York: The Brownfields Reclamation Foundation

The Brownfields Reclamation Foundation (BRF) would be a 501(c)(3), nonprofit foundation, established for the sole purpose of locating and remediating, contaminated properties within the EPA definition of "brownfields." These properties would be remediated and then returned to productive community use. It would be the intent of BRF to encourage a partnership between the community where the site is located, local, state, and federal governmental authorities, the owner of the property (if one exists), corporate sponsors, and BRF in the remediation project. The ICMA Conference in Washington, D.C., this past July, noted the importance of local government participation in the cleanup and redevelopment process. Of specific importance is local governments' involvement in remedy selection, grass-roots participation, and future land-use decisions. BRF would be a useful tool in forging the necessary partnership.

Project Initiation. By networking with the various governmental authorities, local, state, and federal, as well as with real estate developers, BRF would locate and target brownfields sites for remediation. Once a site is identified, an evaluation and assessment process must be conducted to determine if the site meets the BRF criteria. This criterion includes property size, extent of contamination, location of the property, and the projected cost of the remediation. BRF will conduct sufficient due diligence so as to satisfy its trustees as to the viability of the project.²³

If the current owners of the property have an interest in the project, but do not have any funds available to assist in the reclamation, the owners will be offered the option of donating the prop-

erty to BRF. BRF will then conduct additional due diligence work to satisfy itself as to who holds title to the site. This accomplishes various BRF objectives. First, it transfers the property to BRF, whose objective it is to reclaim it for the community. This is an attractive option to the owner of the site, as it will qualify as a charitable contribution for tax purposes based upon a qualified appraisal of the site. Once BRF takes title to the property, assessment procedures and eventually remediation could commence. Upon completion of the project, a property could either be contributed back to the community with the understanding that it would be used only for community betterment or it could be sold to a private interest.

Another option for the acquisition of brownfields sites is either the contribution or purchase of a mothballed site from a governmental authority or corporate entity. It would be expected that the owner, if governmental, would provide advantageous tax breaks by way of real estate tax abatements or reductions, as well as access to low-cost financing for the remediation process. The advantage would be to get a non-productive asset off of the tax rolls and recreate it as a usable, productive property that would enhance the community it was located in. If the only option available for the acquisition of the site is the purchase of it from an individual or business entity, then upon the completion of proper evaluation and assessment, the purchase would be accomplished with funds available by way of contributions received as well as public funding sources.

The owner(s) of the brownfields site, if they wish to remain the owner, will be required to contribute seed money towards the project costs commensurate with their ability. A formula will be established by BRF that will calculate an owner contribution that will not have a negative economic impact on the owner but yet will be proportionate to the value of the site, the cost of remediation, and the owners' ability to contribute.

Project Financing. The BRF could arrange for 100 percent financing, which would include the costs of property acquisition and environmental assessments (the non-cleanup phase), remediation, and the costs of environmental insurance premiums. It is also anticipated that individuals within the immediate community will take more than a personal interest in the redevelopment of the site.

The actual funds for the assessment and remediation phase will come from numerous sources. In addition to gaining access to federal and state financing sources, owners that elect to remain owners of the property will be required to contribute an equitably proportionate share of the projected costs to the project. It is expected, however, that the majority of the funding for the remediation will come from public funding sources such as government grants, low-interest loans, industrial revenue bonds,²⁴ and other bond issues that are established specifically with brownfields reclamation in mind.²⁵

Project Staffing. The BRF staff will have technical expertise in the areas of real estate, insurance, risk financing alternatives, environmental science, and law. For example, the BRF staff will take advantage of the latest federal brownfields initiatives such as the Brownfields Targeted Assessment Programs, currently utilized by EPA's Region VII office. That program encourages redevelopment of brownfields by targeting sites with a strong redevelopment plan that demonstrates that the project would serve a worthwhile public good — bringing jobs to the community, increasing neighborhood stability. BRF could network with EPA regional offices and successfully monitor/implement such assessment programs if they were made more widely available.

BRF's staff will have the expertise to evaluate all aspects of an anticipated project and identify other potential loan sources, including those made available through the Department of Housing and Urban Development (the focus of such projects will be housing), Community Development Block Grants (available under the Housing and Community Development Act of 1974)²⁶ pursuant to which local governments can acquire loans for the acquisition, construction, renovation or rehabilitation of private and public facilities, and the HUD § 108 loan guarantee program through which loan proceeds can be used to offset large up-front expenses for which annual block grants are not feasible. BRF could also help identify empowerment zones that will be targeted by HUD to receive financial, regulatory, and technical assistance. HUD will provide \$25 million in grants and Section 108 loans in 1998, and it is anticipated that the available funds will double in 1999.

It is also anticipated that BRF will tap into the financial assistance available from the Small Busi-

ness Administration and its loan programs, the SBA 7(a) Loan Program and the SBA § 504 Development Company guarantees (a program specifically designed for nonprofit corporations). In addition BRF will ensure compliance with the Community Redevelopment Act²⁷ pursuant to which financial institutions are required to provide access to loans that support community redevelopment.

Although BRF staff will have the technical expertise to obtain access to a wide variety of state funds, BRF is proposed to operate in New York, a state where comprehensive legislation to encourage public or private brownfield redevelopments is lacking. Therefore, BRF will create a Brownfields Loan Fund that will provide financing for projects that are unable to obtain it through the normal venture capital channels.²⁸ The fund will make low-interest loans to property owners. The expected borrowers include small- to medium-size companies and individual property owners. The interest income that comes back into the fund from the payment of the loans will be used for the operational costs of the fund as well as for additional brownfields redevelopment projects.

Conclusion

The proposed nonprofit entity incorporates the advantages recognized in the FIER study. It creates additional financing options to owners and borrowers. The organization's staff works with developers to guide them through the maze of the marketplace, thus clarifying the risk analysis and facilitating investment and regulatory approvals. Its most valuable asset, however, is its ability to liaison with the target community. This will serve to generate commitment for projects and promote good will amongst funding sources, local governments, and the people they serve.

The Old Harbor Marine experience is one being played out in many jurisdictions from coast to coast. Rather than allow underutilized properties to persist, efforts must be launched to expand the reaches of this necessary and beneficial market. ■

Notes

¹ 42 USC §§ 9601, et seq.

² See, Financing Initiative for Environmental Restoration (FIER), The Development Fund, 1998. This trend was recognized in a recent front-page article in the New York Times, "For Urban Wastelands, Tomatoes and Other Life,"

(NYT, March 3, 1998 by Andrew C. Revkin) in which the author noted that private developers will look for land to remediate in those states where the protections provided investors and developers are "firmer and clearer."

³ In July 1998 the International City/County Association (ICMA) conducted its symposium "Windows on Washington" where governmental officials gathered to share experiences regarding the redevelopment of brownfields. They concluded that the major concern of developers was certainty. Symposium participants further recognized that governmental authority can derail a deal when a developers' cost projections are rendered invalid by agency action or inaction.

⁴ For example, CERCLA imposes strict and retroactive liability on owners/operators of contaminated properties. On a state level, New Jersey's Spill Compensation and Control Act NJSA 58:10-23 et seq., imposes strict liability on contaminated site owners.

⁵ Findings made at the July 1998 Washington, D.C. symposium sponsored by the International City/County Management Assoc. (ICMA), entitled "Windows on Washington." ICMA is forming the ICMA Superfund/Brownfields Research Institute to be used as a "blueprint" on ways to enhance the role of local government in Superfund cleanup and redevelopment.

⁶ P.L. 1997, Ch. 278.

⁷ Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 et seq. (May 19, 1995).

⁸ Code Section 12-8-201. The amendment was part of a bill (S.B. 486) approved by the Georgia General Assembly and signed by Gov. Zell Miller on April 23, 1998. It loosens the requirements for a property on the state's hazardous site inventory to qualify for protection from liability associated with cleanup.

⁹ 30 N.J.R. 2373(a). To facilitate remedial activities at brownfield sites, the NJDEP proposed amendments to its Industrial Site Recovery Act to identify responsible parties, its rules pertaining to the Oversight of the Remediation of Contaminated Sites preventing further compulsory remediation once a cleanup has been certified, and it will encourage the use of innovative technologies.

¹⁰ H. 5776. The law limits the liability of new owners or tenants who did not cause contamination and exempts innocent parties from lawsuits. Redevelopment authorities, community development corporations and economic developments corporations also receive liability protection.

¹¹ Between 1995 and 1996, EPA funded 76 National and Regional Brownfields Assessment Pilots, at up to \$200,000 each, to support two-year explorations and demonstrations of brownfields solutions. In 1997, EPA was to fund more than 27 pilots. The goal of the funding is to promote a unified approach to site assessment, environmental cleanup, and redevelopment.

¹² The preamble to the Agenda noted that the United States Conference of Mayors had identified brownfields as the number one environmental issue in the nation.

¹³ The Agenda was specifically designed, "around the principles of protecting health and the environment, enhancing public participation in local decision-making, building safe and sustainable communities through public-private partnerships...."

- ¹⁴ 62 Fed. Reg. 442274 (Aug. 20, 1997). Communities receive national visibility as well as technical, financial and staff support.
- ¹⁵ Participating federal agencies include the departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, Transportation, Treasury, and Veterans Affairs as well as the General Services Administration and Small Business Administration.
- ¹⁶ Community and special interest groups lobby for more stringent residential cleanup standards because the "industrial use remedy" is not viewed as sufficiently protective. For example, in New York, bond act monies for environmental projects are limited to sites cleaned to Superfund standards, a requirement imposed by environmental groups in exchange for their support of the act.
- ¹⁷ 42 USC § 6991.
- ¹⁸ The bond act was approved by voters in November 1996. Of the \$1.75 billion fund to be used for environmental projects across New York State, \$200 million was available to state municipalities for brownfield remediation. As of May 1998, the Department of Environmental Conservation awarded \$7.4 million for the cleanup of 70 sites across the state. The bond act was designed to reimburse a municipality for 75 percent of the cost of brownfield site investigations and cleanups.
- ¹⁹ The DEC set aside only \$160,933 for Suffolk sites which also include the Veterans Nature Study Area in Huntington (\$118,183) and 115 Front Street (\$42,750) in Greenport. Under the bond act, a municipality is eligible for a brownfields grant if it owns a property that may be contaminated with hazardous substances. It is not eligible if it is responsible for the contamination or if the property is listed as a class 1 or 2 site on the New York State Registry of Inactive Hazardous Waste Sites.
- ²⁰ Overall, five projects on Long Island have received bond act monies. One of the projects located in Glen Cove has also qualified as a Brownfield Showcase Community, and will receive \$1.4 million as part of that program.
- ²¹ New York State has created a voluntary cleanup program where a developer can receive a release from liability for contamination at a site thus having liability only for the site's remediation. A party that chooses to undertake a voluntary cleanup may cease site redevelopment if remediation of contamination is found to be too extensive. For the voluntary program, the level of necessary cleanup varies according to the site's intended end use.
- ²² One of the findings made by ICMA is that a new approach to brownfields redevelopment requires a partnership among the community, elected officials, and city agency staff. In Minneapolis, the development agency forged links to religious communities that saw jobs creation in the inner city as a large part of their program.
- ²³ On a smaller scale, sites like the Old Harbor Marine can be targeted by BRF. On a much larger scale, a potential target for BRF, for example, could be the 562-acre former Kings Park Psychiatric Center in New York's Suffolk County. The site will be very costly to cleanup, but developers have already expressed an interest in a multi-use plan that includes a golf course, marina, senior housing, hotel, business center and retail accommodations that may be widely supported by the Kings Park community.
- ²⁴ For example, a general obligation bond backed by a municipality or developmental authority can finance land acquisition, site preparation, and improvements.
- ²⁵ Banks do loan funds that serve their local communities; however, small and medium sized banks may lack qualified staff to underwrite loans with contamination problems and to evaluate the environmental risk up front. See, FIER report, February 1998.
- ²⁶ 42 USC §§ 5301 et seq.
- ²⁷ 12 USC §§ 2901(a) et seq. For greater detail on these programs, see the highly informative article by Larry Schnapf, "Financing Brownfields Development: Part I," printed by BNA in its Toxic Law Reporter dated January 7, 1998.
- ²⁸ Venture or investment capital initiatives to finance high-risk projects involving significant environmental contamination are available through partnerships formed between real estate development corporations and environmental consulting firms ("real estate workout funds"). These firms, however, look to turn a profit on the project by buying and selling the subject real estate themselves. In other words, the firms provide equity capital, not loans.