# PUBLICATION

## Brownfield Activity Continues

**May 31, 2007**

***Summary:*** *Brownfield programs of various types continue to evolve and provide important assistance to those selling, buying, developing, or lending on properties with real or suspected environmental impacts.*

The term "brownfields" is familiar to most people in the real estate business, but the subject is actually quite diverse and sometimes even amorphous. Generally brownfields have been defined as abandoned, idle or underutilized properties at which there is a reality or a fear of strict environmental liability for potential new site owners or operators due to past uses of the site or of the area in which the site is located. For such real property, "the expansion, redevelopment, or reuse" thereof "may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[1] The components of government programs or business approaches for putting such land back into productive use and managing the risk of liability associated with it can vary greatly between federal and state laws, from state to state, and among private mechanisms.

The rehabilitation of brownfields has come a long way in the last 15 years since it was better realized that harsh, nofault cleanup liability was causing many used properties to be avoided and overlooked while previously unused "greenfields" were being developed without fear of residual pollution from past use. However, hundreds of thousands of brownfield sites remain nationally. Aside from the growing sophistication of buyers and lenders in understanding and dealing with environmental matters, key components of the brownfields "movement" have included:

**States**
State brownfield programs such as voluntary cleanup processes and liability shields, together sometimes with streamlined procedures, realistic cleanup standards, greater allowance of institutional and engineering controls, and even some financial incentives have led the way in getting at the huge inventory of brownfield sites in small towns as well as in major cities and suburban regions. This effort has made sense in that traditionally state law and local governments have been paramount in determining land use issues. Also, states have had the ability to experiment in voluntary and state superfund programs (which, unlike many other environmental regulatory authorities, are not delegated to the states by federal EPA) with common sense variations to encourage activity at these sites. Petroleum underground storage tank trust funds are part of this overall state facilitation approach, as are dry cleaner site funds in those few states with special dry cleaner regulation and remediation programs.

**Federal**
Even the largest and harshest of site liabilities under federal superfund have become more balanced over recent years by the passage of CERCLA amendments in 1996 providing for lender liability protections and safe havens, and later by the 2002 Small Business Liability Relief and Brownfields Revitalization Act and its new liability defenses. These milestones and rulemakings like EPA's recent "all appropriate inquiry" standard have helped to realize and expand upon the earlier "innocent landowner defense" and site specific prospective purchaser agreements to facilitate purchase and use of properties, including those with known impacts, so long as appropriate precautions and response steps are then taken.[2] The federal government has also created grant and loan programs for brownfields, aimed at giving local jurisdictions the ability to assess and leverage

brownfields in their areas rather than direct monies going to private developers (although tax relief may be available in certain scenarios).

**Private**
The improvement and standardization of due diligence, and the general enforceability of contractual indemnities and releases among private deal parties as against each other if not the government, has helped move brownfield transactions along in recent years. As important may be the growth of specialized redevelopment consultants and cleanup cost containment and guaranty methods to allow better quantification and limiting of risks at some sites. Also the emergence of environmental insurance products to plug gaps between reluctant sellers and wary buyers has been important in aiding transactions involving contaminated property or investigated-but-still-uncertain sites retaining perceived liability risks. Ultimately it can be difficult for brownfield programs to produce consistent results because site development choice is voluntary business behavior that weighs many pros and cons of cost, location, risk, infrastructure, work force, timing, and so on. But through a hodgepodge of available programs, products and legal mechanisms, often the balance of overall real estate factors can be tipped in favor of a seller allowing such a used site to emerge onto the market again without fear and a buyer selecting that site for its new project without fear, despite its real or suspected environmental impairments.

There are a number of hot topics in brownfields today as activity levels continue to be high due to economic growth, availability of investment funding and urban land scarcity coupled with rural land preservation trends. One such topic is the required increase in reporting of corporate liabilities and contingencies for public companies since the Sarbanes-Oxley Act of 2002 and the promulgation of several recent accounting practices standards. Many companies must now start to assess and disclose their "asset retirement obligations" to include cleanup costs for dormant "mothballed" properties even if there is no public knowledge of, government enforcement at, or required cleanup taking place on those sites. This change of approach will no doubt cause many environmentally suspect properties to be addressed sooner than expected and/or be put up for sale rather than be accounted for under these corporate transparency rules now being expanded. Many of these sites are ones where companies may have previously limited their risks by simply holding onto them and not letting others stir up hidden conditions that have never been fully investigated, but which possibly could be costlier than the value of the property.

Some trends that may work against brownfield redevelopment at times come from competing policy interests and advances in knowledge of and consideration for persons living or working on or near brownfield projects. For example, a hallmark of many brownfields is the ability to afford, manage and finish a project if some minimal contamination is allowed to be left in place at the site. In those cases, future users are protected by restrictive covenants or other legal or physical property controls to assure safety and lack of exposure. However, much concern has been expressed lately about whether such institutional controls are being reviewed, monitored and enforced into the future after a site is finished and "no further action" is required by the oversight agency. EPA and many states are increasing their vigilance and enhancing the responsibilities of current and future owners of brownfield sites to be sure that they adhere to recorded and engineered restrictions and even certify compliance to the agency on an ongoing basis. Such added burdens may discourage some potential brownfield developers or buyers from assuming the greater post-cleanup responsibilities.

Another counter-trend or backlash may involve the concept of soil vapor intrusion — lawsuits alleging it, or attempts to evaluate and regulate it as are now being made in places such as New York. Soil vapor intrusion refers to levels of organics contamination (such as from certain solvents) reasonably allowed to remain in soil and/or groundwater at sites under paved caps or buildings, the vapors from which may in some conditions penetrate into the buildings above and allegedly cause harmful long-term inhalation exposure to residents and workers therein. Prior closed site remedies may be reopened in order to examine and address this new risk

pathway not considered previously. Such an area of perceived risk newly emerging may argue against a developer choosing an impacted brownfield site for a project without the potential additional costs of preventing or mitigating soil vapor intrusion and other safeguards being taken into consideration.

One other challenge for some brownfield sites and proposed property reuses is the likely rejuvenation of the environmental justice movement with the encouragement of the new Democratic majority in Congress. Environmental justice is the concept and policy that poor and minority communities should not bear disproportionate environmental impacts and burdens from facility siting and permitting, contaminated site cleanup handling, and the whole range of government remedial and land use decisions. Redeveloping a brownfield property in a poor urban neighborhood may obviously bring environmental and other benefits to that community. But if a planned new use is industrial (or sometimes even just commercial) with potential localized emissions or other perceived health impacts, project participants may be wary of the added risk of permit challenges, litigation or other opposition or delays based on environmental justice which would not exist at a new greenfield site competing for the same development.

How might the multitude of brownfield-related programs continue to evolve and improve going forward? Certainly, many with an interest in brownfields would urge Congress to appropriate federal money more fully to the already authorized brownfield programs, including making funds available for cleanup as well as assessment, widening the base of local governments that can obtain brownfield grants and loans, and making the processes simpler and more flexible. Many details could be addressed within each of these broader points in order to better encourage brownfield redevelopment. Private parties also urge additional targeted liability relief at both the federal and state levels, including clarification of *Cooper Industries v. Aviall Services*, 543 U.S. 157 (2004), which raised doubts about the ability of voluntary cleanup parties to pursue federal superfund contribution rights against other liable parties to force more equitable sharing of site response costs. Parties may also wish to embrace the growing concern about ensuring the viability and integrity of site institutional controls, in return for maximizing their continued use. Their consistency in protecting human health and the environment can be both better fulfilled and better communicated to neighbors and the public.

At the most basic level, however, brownfields progress and deals are done when state laws are set up, and state environmental agency staffs are inclined, to facilitate reuse of contaminated parcels in ways sensitive to the needs of sellers, buyers and lenders, including timing considerations. State cleanup programs that are more common sense and results-oriented and that apply realistic target standards and risk assumptions will find brownfield "customers" lining up to join, participate and spend their money for the benefit of everyone, including public health and the environment. This is true far more than with programs that are overly complex, are too procedural and inflexible, may treat a new owner like a "bad guy" polluter, and/or go too far in injecting unrelated third parties into the mix so that timing is slowed down and deal factors push a transaction or project to another less-burdened location. When parties are present and want to do the right thing, the states should help rather than hinder — thereby letting everyone win. Of course, adequate staffing and funding for these "good" state cleanup oversight and brownfield programs are also essential to letting them work in the ways intended.

This article has mentioned many broad concepts and generalities related to brownfields. The Baker Donelson Environmental Practice Group and Real Estate Practice Group also have extensive, practical, hands-on experience with making brownfields work for our clients in many different legal and factual settings in the southeastern states and around the country. We have negotiated agreements with environmental agencies and among private parties, have overseen assessments and remedial actions, and otherwise have put together the pieces to guide clients through environmental issues associated with real property. "Environmental" is just one more thing to handle in many deals. The risks require careful and expert advice and attention. That said, environmental problems, or just past property uses that create suspicions of liability today, should not keep most deals from taking place.

1 42 U.S.C. § 9601(39).

2 See 70 Fed. Reg. 66070, 11/1/05, effective 11/1/06 and codified at 40 CFR 312.