Municipal Setting Designations Spur Urban Revitalization

by Greg Rogers, John Slavich and David Whitten

Recently, an out-of-state investor became interested in developing a retail center in a historically industrial area of Dallas. The economics of the project looked promising subject to one major uncertainty – environmental contamination. The 35-acre, multi-tract assemblage included various existing and historic commercial and industrial facilities, several of which had known soil and groundwater contamination. None of the tracts had received regulatory closure from the state environmental agency, the Texas Commission on Environmental Quality.

Just a few years ago, the sensible advice to the investor would have been to find another site. Today, this property is on its way to becoming home to a $100 million retail development that is certain to spur even more investment in the surrounding area.

The key to the project's viability is the city of Dallas' Municipal Setting Designation program (http://www.dallascityhall.com/html/municipal_settings_designation.html).This successful new program is administered by the City's Development Services Department and is stimulating much-needed economic rejuvenation in many parts of Dallas.

MSDs are authorized by Subchapter W of Chapter 361 of the Texas Health & Safety Code and Chapter 51A of the Dallas Development Code. The interrelated city and state programs each seek to promote urban economic development in a manner that is protective of human health and the environment. They do so by adopting a more realistic approach to the assessment and mitigation of risk to human health from contaminated urban groundwater.

In many parts of Dallas, perched groundwater at depths between 10 to 35 feet is contaminated from historic leaks and spills from dry cleaners, gas stations, and other commercial and industrial activities. Groundwater suitable for human consumption typically lies at depths of more than 300 feet. In between the perched groundwater near the surface and the underlying aquifers, there are hundreds of feet of impermeable bedrock that prevent cross-contamination. Cleanup of perched groundwater is therefore unnecessary to protect the area's true groundwater resources.

State cleanup standards assume that city dwellers get their drinking water from shallow groundwater wells or that shallow groundwater may be needed for drinking water in the future and require that shallow perched groundwater, even if it is unsuitable for consumption as a practical matter, must be cleaned up to safe drinking water standards — often a very lengthy and expensive proposition. Dallas' public water supply comes exclusively from surface water in area reservoirs, and there are very few private potable water wells within the city limits. Following the default state cleanup standards thus requires that conditions that do not present a risk must still be addressed.

In contrast, an MSD effectively condemns by city ordinance the shallow groundwater, so it is no longer necessary to meet safe drinking water standards. Investigation of soil and groundwater will still be required, and, depending on the conditions at a site, some cleanup may be necessary to ensure protection of human health and the environment, but environmental impacts generally can be resolved more quickly and at significantly less cost than would be the case without an MSD.

Equally important, for property owners and developers, MSDs remove much of the uncertainty associated with environmental contamination. By offering faster and cheaper cleanups, and greater certainty regarding the regulatory timeframe and budget, MSDs encourage new capital investment that in turn promotes area-wide redevelopment, resulting in the creation of more jobs, higher taxable property values, and a stronger urban economy.

Since Dallas approved its first MSD in September 2004 for Goodwill Industries of Dallas, close to $500 million in new capital investment has flowed into MSD sites.

To obtain an MSD, the applicant (generally the property owner or a developer) must file an application with the city of Dallas. Among other things, the applicant must demonstrate that it has the legal authority to restrict the use of groundwater beneath the MSD area. Developers of multi-tract assemblages can satisfy this requirement before buying the property by obtaining a limited power of attorney from each property owner. Although only portions of a site may be impacted by known contamination, it is often desirable to cover the entire property with a MSD in case unknown contamination is discovered later.

Once the city deems the application complete, it sends written notice of a public meeting to all property owners within 2,500 feet and all registered water well owners within five miles.

The public meeting is followed by a public hearing before the city council. If council approves the application, it will adopt an ordinance prohibiting potable use of the shallow groundwater beneath the site. To complete the MSD process, the applicant files a separate application with the TCEQ for state certification of the MSD.

Once certified by TCEQ, the MSD serves to change the applicable assessment and cleanup standards for the site under state regulations. The revised cleanup standards will generally make it easier to obtain regulatory closure for the site from TCEQ, whether under the Voluntary Cleanup Program or one of the other TCEQ corrective action programs.

The entire process — from the initial application to the city of Dallas to TCEQ approval of regulatory closure for the site — typically takes 12 months.

MSDs represent an innovative and highly effective new tool for responsibly addressing environmental challenges and revitalizing the Dallas urban core. **HN**

Greg Rogers is Of Counsel to, and John Slavich and David Whitten are shareholders at, Guida, Slavich & Flores, P.C. All three lawyers assist clients in addressing environmental risks associated with contaminated (or potentially contaminated) real estate.

Reprinted with permission of the Dallas Bar Association