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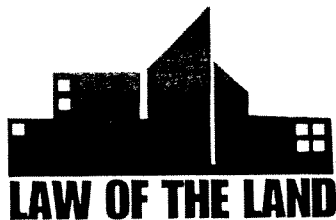
TRASH INTO TREASURE

Legal Issues Involved in Redeveloping Brownfield Properties

by JOHN SLAVICH

A

t Brownfields '99, a national conference sponsored by the United States Environmental Protection Agency, I moderated a panel entitled "Anatomy of a Brownfield." This article summarizes a number of points raised during the panel presentation that will provide practical guidance to attorneys advising their developer clients regarding redevelopment of contaminated property.



- *Brownfield redevelopment projects are real estate deals.* "Brownfields" may be defined as abandoned, idled or underused industrial and commercial properties where expansion or redevelopment is complicated by actual or perceived environmental contamination that can add cost, time or uncertainty to the reuse of the properties or a transaction involving the properties. Recent interest in brownfield projects is due to federal initiatives, as well as changes in states' approach to cleanup of contaminated property, which have added needed certainty and finality to the process of cleanup.

Additionally, the marketplace continues to become more sophisticated in dealing with environmentally impacted properties. As a result, as returns for other properties have leveled out during the current real estate market cycle, a handful of investors have been looking to increase their returns by redeveloping environmentally impacted properties that others have passed up because of the challenges presented.

Brownfield redevelopment projects are, first and foremost, real estate deals. Environmental matters are one of a number of project challenges faced by the developer. Real estate concerns such as location and timing to bring a project to market will still predominate in determining whether to proceed with a rede-

velopment project. Just because a property is purchased for pennies on the dollar because of contamination, it doesn't mean the property is a candidate for a successful redevelopment.

- *Speaking the same language.* The term "brownfield" may have different meanings to different people. The developer may see the term as referring primarily to the contaminated nature of a parcel of property. State government representatives may see the term as referring to the voluntary cleanup programs and other state remediation processes devised to bring some certainty and finality to the process of cleaning up contamination. Federal government representatives tend to use the term to refer to the various agency grants and set-aside programs they have devised as "solutions" to the problems that have been created by the overly broad liability schemes enacted under federal law. Community activists may see the term as primarily a vehicle for social programs that need to be implemented as part of any government approval of a brownfield project in order to alleviate blight in the neighborhood surrounding a contaminated property. As a result, various stakeholders in the private sector and the public sector may be using the same word, but referring to completely different concerns. Some stakeholders may consequently expect a place at the negotiating table when their interest is peripheral at best.

- *Developers face practical issues with site cleanups.* A developer should be concerned with whether environmental issues at a property can be addressed with certainty (the question of whether the nature and scope of potential environmental risks have been identified, along with the fix for those risks) and finality (the question of whether the proposed fix makes environmental issues go away or just pushes them into the future). Governmental voluntary cleanup programs must address those concerns in order to be effective.

Contaminated soils at the site can usually be addressed fairly easily, by digging up the soils and properly disposing of them offsite. As a general matter, properties with contaminated groundwater are much more difficult to deal with than properties with only contaminated soils. If the groundwater contamination originates onsite and extends offsite, or if groundwater originates at an offsite source and impacts the property, the dif-

difficulty of resolving environmental matters increases exponentially. While a site may be "deemed clean" under the certificate of completion, or similar closure determination issued by the state, that does not necessarily mean the environmental liability has disappeared. It is always possible that contaminants are still left at the property and will ultimately have to be addressed. In-the-field issues can arise from soil disturbance during site preparation and construction. Offsite disposal of soil can also trigger future liability. Additionally, an impacted offsite property owner may claim that his property has been devalued by contamination from the brownfield property, even though the offsite contamination would not require cleanup under governmental cleanup standards.

• *Environmental insurance may make a brownfield deal work.* There are now a number of insurance products available to address potential exposures for cleanup costs and third-party liability. The provisions of the insurance policies may, on their face, appear to address environmental issues of concern. A developer that buys an environmental insurance policy, nevertheless, needs to determine from the insurance underwriter whether the expected coverage is what the policy is in fact intended to cover. Parties to a contaminated property sale may use insurance to augment the allocation of environmental risks set forth in their transactional documents. Those parties need to be aware that the language in the insurance policy does not necessarily match up with the provisions allocating risk in the transactional documents.

• *Beware the risk sandwich.* The developer needs to watch out for the "risk sandwich" created where other parties involved with the property in the future have a lower risk profile than the developer. When a developer decides to assume certain environmental risks in connection with a brownfield project, he has to determine whether those risks will present issues to lenders, lessees or future purchasers. Risk profile differences can cause problems with the financing of a brownfield project, as well as marketability of the completed project.

• *Each brownfield deal is unique.* Brownfield transactions are not cookie-cutter deals. Each contaminated property presents its own unique set of challenges. Brownfield deals typically have a lot of moving parts and require creative solutions. The process involves constant improvisation.

Brownfield projects require as part of the development team knowledgeable professionals that have experience in the redevelopment of contaminated property. Professional assistance is needed not only with the technical and regulatory aspects of the project, but also with related strategic transactional issues. Get this input early in the planning, and keep those professionals involved throughout the process. ■■■

John Slavich is a principal in Guida, Slavich & Flores in Dallas. His practice focuses on helping clients develop and implement strategies to redevelop contaminated properties.

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