

GOVERNMENTS OFFERING PERKS TO INTEREST BANKS, BUILDERS

By: Mike Pettapiece (quoted Dan Kirby and Shari Elliott)

They are damaged goods of the past. And remaking these goods is a clear case of matching risks with rewards.

Governments from city hall in Hamilton all the way to Ottawa hope new laws and financial incentives can bring brownfield lands back into the mainstream.

They are offering municipal grants, protection from government orders, and even Income Tax Act changes as hooks to draw in people who might take on challenging and time-consuming brownfield projects.

That's good, says Hamilton planner, Ed Fothergill, because many builders and developers – especially the small players without recourse to large credit lines – are fearful of liability risks and of the costs inherent in tackling a brownfield property.

The Ontario government has created the framework for brownfield redevelopment with a bill it is now steering through Queen's Park. Bill 56 would amend several acts, including the *Environmental Protection Act*. It aims to reduce liability from regulations and orders. And it sets the stage for municipal tax incentives to support brownfield work.

Lawyer Dan Kirby and other colleagues at Toronto law firm, Osler, Hoskin & Harcourt LLP, have studied and written about the bill in some depth.

They laud Ontario for taking the lead with its new bill, for at least offering protection from regulations, such as most orders under the *Environmental Protection Act*. This umbrella of basic protection goes up as long as owners and developers follow protocols for site development and stick to due-diligence rules of the game.

In general, cities will also not attract regulatory liability for contaminated lands polluted by others.

Bill 56 gives cities and towns a two-year holiday or immunity from such regulatory liability should a site end up under a city's control – such as land forfeited for unpaid taxes.

“Bill 56 should be a further encouragement to entering into brownfield development” Kirby says.

In the past, this environmental liability has frustrated would-be buyers, lenders and developers.

“The inability to address this concern adequately” says an Osler, Hoskin & Harcourt summary paper, “has often resulted in an unwillingness to sell or otherwise develop a property”.

More importantly, the paper goes on, potential environmental risks have meant that parties just walk away from deals “to avoid being saddled with significant exposure to uncertain liabilities”.

The bill and its attendant publicity also serve to spotlight the need to remediate lands that otherwise might sit vacant or underused forever.

Even so, Kirby notes the bill leaves untouched the “significant risks” of civil liability in courts from possibilities such as contamination that spreads to adjoining lands.

That civil risk might also burn cities that back brownfield projects that later go bad. If a city relies on erroneous site information from an owner – for example, incorrect information on how badly polluted a site is – the city gets no protection from a civil suit in court, if third parties suffer harm from the contamination and they sue.

Ironically, Kirby says, a builder-developer may get more protection under the bill than a city. So that may impel municipalities to get involved as owners. They could then lease city-owned land back to a developer.

The bill also offers no provincial funding for brownfield work, other than a freeze or cancellation of the education part of property taxes as redevelopment goes on. The forgiveness can last up to 18 months.

So Bill 56 amounts to a great step forward with more ground yet to cover.

It serves to underscore the fact that Canada is just getting started in brownfield redevelopment. Canada is 10 to 15 years behind the United States, where federal and state governments have lavished funds on such programs.

Developer Mitchell Fasken says the lack of government aid can be overcome. For example, federal income tax changes might allow forgiveness for expenses racked up by brownfield owners.

And that’s where the federal government is headed.

The National Round table on the Environment and the Economy likes the idea of financial and tax incentives. The roundtable is an advisory body whose members are appointed by the federal government.

Osler lawyer, Shari Elliott, helped draft a Roundtable report. Among its suggestions are that the Income Tax Act allow remediation costs as a deductible expense against income.

The draft report also talks of a remediation trust and tax credits similar to Ottawa's scientific research and development program. There is also reference to special mortgage insurance for brownfield sites and to a revolving loan fund program.

New money and incentives are one spur. But there remains the bogey of clean-up costs on toxic sites. And civil liability is an Achilles heel for developers. It's not surprising, then, to see the insurance industry serving up some armour.

Kate Dobson-Parks is regional manager for AIG Environmental of Canada. That's a unit of New York based AIG, the largest U.S. based insurance firm in the world.

She says only "a fairly small component" of AIG's business goes to brownfield work in Canada.

"It's definitely growing and I think the products are there. There just is a lack of awareness (in Canada) and also there is not a lot of brownfield development going on".

Owners and contractors can hire people to assess what risks they face in remediating toxic lands.

But uncertainty lurks, if contamination on a site runs deep or, if there are risks of pollution spreading.

Liability policies – you can pick them up at many retail brokers – transfer the risks to an insurer. The shift acts to restore some financial certainties and to even out a project's risks.

Cost cap insurance is a product that essentially caps the costs that the owner incurs in remediating a brownfield site. Clean-up or management costs above the cap can be covered in a policy.

Pollution legal liability insurance covers clean-up, injury or off-site property damage. There is also coverage for business interruption by an owner or developer or for a decrease in property value caused by unexpected pollution.

The insurance is a salvation not only to owners, but also to lenders. Pension funds and banks are "very risk-averse" to accepting even generic provincial "as good as clean" standards, said Kirby.

Insurance can reduce the risk to banks that are skittish about lending to someone whose ability to repay is corrupted by a contaminated site.

But a brownfield policy is not cheap. Dobson-Parks says a \$1 million policy might carry a premium cost of \$50,000.00. The policy broadly covers two areas: financial risk that an owner or developer might take on and the liability risk from contamination.

Insurance coverage, she said, “can definitely provide comfort zones” to developers and to their lenders.

And the risk to an insurer is not as high as it might seem. Most projects, after all, have limited risk fallout – the contamination is easily contained, the toxic soil can be remediated and trucked away.

“We look at it as low frequency”, Dobson-Parks said. “But when something does happen, you’ve got high severity. The insurance is really for the unexpected and the unknown”.