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OBSTACLES TO BROWNFIELD REDEVELOPMENT

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Brownfield redevelopment has attracted much-needed attention in Canada in the past three years. Brownfields are fenced centerpieces of once vibrant (but now declining) industrial communities. Naturally, redevelopment of abandoned, idle or underused commercial and industrial sites is an engine for urban renewal, economic development and job creation.

However, obstacles can get in the way. These include:

- Uncertain and unacceptable civil and regulatory legal liability regimes;
- Inconsistent, unclear, unhelpful, exceedingly onerous and unscientific remedial requirements at the various levels of government;
- Regulatory hostility toward contaminated lands and their owners, and lack of a facilitative attitude at all levels of government;
- Absence of adequate and consistently accessible expertise within government agencies dedicated to the development of brownfields;
- Requirement for large capital investment;
- Unwillingness of lenders to provide financing on potentially contaminated sites; and
- Lack of a common vision and a consistent system for development.

Typically, brownfields do not exist where the market value of property exceeds the cost of remediation to applicable regulations and guidelines. The brownfields stalemate arises most often when the cost of remediation to applicable criteria exceeds market value, and where the risk profile of the property encourages long-term management.

The Developer's Dilemma

Several U.S. based hybrids of environmental engineering and real estate development firms have sought brownfield development opportunities in Canada over the past two years. Despite the breadth of their experience, these firms have yet to find their way in the Canadian context.

The first obstacle is convincing the corporate owners of desirable brownfield sites to part with title to the property; the second is to control the risk profile of a contaminated site.

Why would the owners want to hold onto these contaminated sites? Owners are unwilling to accept the risks of civil liability to subsequent third-party owners and occupants of the redeveloped sites (in addition to the regulatory liability that arises from the changed use of the site). Most owners keep such sites vacant as the best available strategy to manage the risks – under the current liability regime. Brownfield redevelopment specialists are often prepared to accept a transfer of liability from the owners, however, there is no provision in any current federal or provincial legislation to permit liability transfers that would bind regulators and third parties.

Even if redevelopers could convince corporate landowners that they're able to eliminate the residual environmental liability (which is a task they cannot currently accomplish in Canada) their problems would just begin.

The brownfield developers must next work their way through the marvel that is the combined federal, provincial and municipal legislative base to find a consistent set of rational, science-based remediation requirements and standards.

Theoretically, site-specific risk assessment is an option available under some of the provincial guidelines and regulations. However, the lack of any regulatory commitment to (and a mature framework for) risk assessment frequently makes any such assessments a dream that is beyond reach.

Additionally, brownfield developers would have to consider and accommodate the many layers of municipal requirements that govern issues of land use planning and the environment. They may also be faced with municipal attempts to demand the most stringent remediation criteria, even in circumstances where the applicable legislation does not require them.

Redevelopment can only be accomplished if the developers can persuade environmental regulators to provide some manner of binding assurance that the contemplated remediation action plan will bring an end to civil and regulatory liability and, once the remediation is complete, that the site in fact meets those requirements. Both of these will be subject to the whim of the regulator, changes in standards and subsequent changes in land-use – even after the property is sold. In short, there is virtually no place in the country where the proponents of brownfield redevelopment can either obtain civil and regulatory closure with significant finality. Nor can they quantify their future financial risk.

The next challenge will be to convince citizens' groups and wary prospective purchasers or occupants of the environmental value of a proposed undertaking. Lenders must then be convinced that the risks associated with the project are worthwhile.

Even if proponents navigate through these myriad obstacles – which in Canada they virtually cannot yet – they still have to find enough return in the project to justify the investment. Given the difficulty and expense of the task and the higher than usual risks, the rate of return would have to at least equal if not exceed that provided by available greenfield sites.

U.S. PROGRESS

In contrast to this situation, many U.S. states have alleviated obstacles and made substantial progress.

Liability is often limited pursuant to the statute for individual state clean-up programs in the form of certificates of completion, action letters or covenants not to sue. While protection is limited to liability under state laws, 15 states (so far) have negotiated a Memorandum of Agreement with the U.S. EPA to provide concurrent protection from liability under state and federal laws. In states that have not yet negotiated an agreement there is an informal policy providing that the U.S. EPA will not pursue enforcement actions against sites in a states' voluntary clean-up program. Some states, such as Indiana, have also barred third party claims for conditions that exist when the work plan is approved.

Many states have adopted risk-based correction action standards that provide flexibility. This encourages innovative clean-up technologies or institutional controls that can help to contain costs.

Regulators are proactive about brownfields development. Some states have staff to perform the work or at least oversee it and provide access to expertise. For instance, New Hampshire offers site investigation and remedial action planning services to municipalities, using EPA grants to pay state environmental consulting contractors.

Financial assistance is available federally and at the state and municipal level. Federal programs fund pilot projects up to $200,000 over two years and offer tax incentives. A revolving fund makes low-interest loans available and offers job grants and more. States also offer such incentives. Municipalities assist through tax abatements for increased property assessment of brownfield properties.

Many of the programs include a provision that specifically excludes lenders from liability so long as the lender does not exercise managerial control over the site.

For a summary of 48 brownfield programs in the U.S. see www.hazmatmag.com

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