

MUNICIPAL LAW

U.S. IS AHEAD OF US IN 'BROWNFIELD' REDEVELOPMENT

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Brownfield redevelopment issues have been attracting long-overdue attention in Canada over the past three years.

Brownfields are the fenced centerpieces of once vibrant but now declining industrial communities. Brownfield redevelopment can be an engine for urban renewal, economic development and job creation, transforming abandoned or underused commercial and industrial sites.

In this article we outline the obstacles that stand in the way of brownfield redevelopment and offer an overview of how these obstacles have been overcome in the United States.

Obstacles to redevelopment

The obstacles consistently identified by the proponents of brownfield redevelopment can be summarized as follows:

- Uncertain and unacceptable civil and regulatory legal liability regimes;
- Inconsistent, unclear, unhelpful, exceedingly onerous and unscientific remedial requirements imposed by 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 redevelopment of brownfields;
- Requirement for large capital investment;
- Unwillingness of lenders to provide financing on potentially contaminated sites; and
- Lack of common vision and a consistent system for development.

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

The developers' problem

Several United States-based companies, which are essentially 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, the United States firms have yet to find their way in the Canadian context.

The first task consists of convincing the corporate owners of desirable brownfield sites to entertain parting with title to the property, and control to the risk profile of a contaminated site. The owners, acting rationally, 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 arising out of the changed use of the site.

Most owners choose to keep such sites vacant as the best available strategy to manage the risks under the current liability regime rather than opt for the redevelopment where the potential liability is infinite both over time and in magnitude.

The brownfield developers are prepared in many instances 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 be binding on regulators and third parties.

Even if developers could convince corporate landowners that they are capable of eliminating the residual environmental liability (a task they cannot accomplish in Canada) their problems would be only just beginning.

Next the brownfield developers must work their way through the maze 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 pleasant dream that is beyond reach.

Brownfield developers also 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 though the applicable legislation does not require them.

The 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, subsequent 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 or quantify their future financial risk.

The next challenge will be to convince citizens' groups and wary prospective purchasers and occupants of the environmental worth of a proposed undertaking. Beyond laying to rest public concerns, they must also convince a banker that the risks associated with the project are worth taking.

Even supposing that redevelopment proponents successfully negotiate these myriad obstacles – which in Canada they simply cannot do at present – they still have to find enough return in the project to justify the investment of money, effort and frustration. 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. overcomes obstacles

In many states in the United States the seven obstacles listed in this article have been alleviated and substantial progress is being made to encourage brownfield redevelopment.

Liability is often limited pursuant to the statute creating the individual state cleanup programs in the form of certificates of completion, no-further-action letters or covenants not to sue.

While protection is limited in liability under state laws, 15 states (so far) have negotiated a memorandum of agreement with the United States Environmental Protection Agency (USEPA) providing 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 USEPA will not pursue enforcement actions against sites in a states' voluntary cleanup program. Some states, such as Indiana, have also barred third-party claims for a condition existing when the work plan was approved.

Many states have adopted risk-based correction action standards providing flexible standards that encourage innovative cleanup technologies or institutional controls that can help to contain costs.

Regulators are actively encouraging brownfields development. Some states have staff to perform or at least oversee the work performed and provide access to expertise to assist with remediation undertaken. For instance, New Hampshire offers site investigation and remedial action planning services to municipalities using EPA grant money to pay state environmental consulting contractors.

Financial assistance is available federally, at the state level and the municipal level. Federally, there is the USEPA pilot program which funds each pilot project up to \$200,000.00 over two years. There are federal tax incentives providing favourable treatment of remediation expenses. There is a revolving loan fund making low-interest loans available. Municipalities assist through tax abatements for increased property assessment or brownfield properties. Many of the states' programs include a provision

that specifically excludes lenders from liability so long as the lender does not exercise managerial control over the site.

The USEPA and the state level EPA offices are all working together toward a common vision encouraging redevelopment.

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