

WILL DEVELOPERS BE ENTICED BY ONTARIO'S NEW BROWNFIELDS LAW?

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While it's the cornerstone of Ontario's initiative to encourage clean-up and redevelopment of contaminated lands, the new Brownfields Act's limited protections and financial incentives may not carry enough weight in developers' cost-benefit analyses to see these goals realized.

On October 31, 2001, the Ontario legislature passed an omnibus bill entitled the *Brownfields Statute Law Amendment Act, 2001*. While the Brownfields Act was given Royal Assent on November 2, 2001, it will likely not be declared in force for at least several months, given the regulations necessary to its operation must still be developed.

The Act is intended to form the foundation of the province's brownfield redevelopment initiative. It relies upon three central elements to promote redevelopment.

First, it provided an opportunity to limit the regulatory exposure of virtually all participants in the brownfield redevelopment cycle. The regime offers limited protection against a host of regulatory orders that could be issued under Ontario's *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Pesticides Act*. However, in order to qualify for this protection, certain conditions must be met, and the protection provided under the scheme is subject to re-openers (which permit orders to be issued in some circumstances notwithstanding the protection offered).

The scope of protection is limited to the four corners of the property remediated, to the contaminants present at the property at the time of the registration of the Record of Site Condition (RSC). Protection is also limited to the property use specified in the RSC or a use with less stringent criteria than the use specified in the RSC. However, protection can be stripped away in a number of circumstances, including where the presence of the contaminants for which protection would otherwise be granted present a danger to the health or safety of any person.

Second, while risk assessment is currently available on a policy basis under the *Guideline for Use at Contaminated Sites in Ontario*, the Brownfields Act provides legal recognition for risk-assessment-based remediation approaches. However, the use of such a remediation approach for any particular property is still subject to review and acceptance by the Director.

Furthermore, developers who adopt a risk-assessment-based remediation approach will not likely qualify for the financial incentives referred to below, since eligible expenses

have been defined as “the costs of any action taken to reduce the concentration of contamination on, in or under the property”. This limit on the availability of funding makes it clear that spurring redevelopment of brownfields is not the only goal under this legislation. To qualify for the financial incentives the environment must also be improved.

Third, the Brownfields Act provides for municipal tax incentives in support of brownfields redevelopment projects. The tax incentives offered take the form of property tax relief. This legislation given municipalities the authority to freeze or cancel the municipal portion of property taxes for the period that rehabilitation/development is undertaken and, if authorized by the Minister of Finance, to provide similar relief for the education portion of property taxes.

Incentives vs. Limitations

Whether the new Act provided enough protection from uncertain liabilities and sufficient incentives to actually achieve its primary goal of encouraging brownfields redevelopment remains to be seen. The final determination in that respect will be made by the marketplace, including those potentially providing financing.

What is clear is that there are obvious limitation to the Act’s effectiveness given the limited extent of protection afforded, the broad re-openers threatening the protection and the lack of protection against civil actions and potential off-site issues. These limitations, in conjunction with the limited financial incentives the legislation provides, may negate any change in the cost/benefit analysis for brownfield-over greenfield-development.