

THE GREENING OF BROWNFIELDS

What is required to encourage the redevelopment of abandoned or under-utilized industrial or commercial properties?

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Brownfield redevelopment has attracted much needed attention in Canada recently. In particular, Toronto's recent bid for the 2008 Olympics and the related proposals to redevelop the prime, but likely contaminated, property located at Toronto's waterfront contributed to the introduction by the Ontario Legislature of amendments to encourage brownfield redevelopment.

Brownfields are generally defined as abandoned, idle or under-utilized industrial or commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination. Redevelopment of these sites is important as this would act as an engine for urban renewal, economic development and job creation. However, many obstacles frequently arise to frustrate redevelopment. They include:

- 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 towards contaminated lands and their owners and, conversely, the absence of a facilitative attitude at all levels of government;
- A virtual absence of adequate and consistently accessible expertise within government agencies dedicated to the development of brownfields;
- The need for large capital investment;
- Unwillingness among lenders to provide financing on potentially contaminated sites;
- A lack of a common vision and a consistent system for development.

Having examined the brownfield programs in place in 49 U.S. states, we believe there are seven main elements essential to encouraging successful brownfield redevelopment in Canada.

- Financial incentives in the form of loans and/or grants;
- Tax incentives;
- Liability protection by legislation;
- Negotiation of a memorandum of agreement between the federal and participating provincial governments providing concurrent protection from liability under federal and provincial laws;
- Inclusion of the party responsible for contamination in liability protection regimes;

- Formal risk-based corrective action standards;
- Use of institutional controls.

One of the lessons learned from the U.S. experience is that, in order to encourage a meaningful redevelopment, the involvement of the federal government is necessary. This has become especially apparent in light of criticism made in response to the Province of Ontario's effort to address redevelopment issues in its omnibus Bill 56 entitled, *The Brownfields Statute Law Amendment Act, 2001*.

This proposed legislation would significantly amend Ontario's *Environmental Protection Act* and other relevant statutes forming the legislative foundation of the province's "brownfield redevelopment" initiative, designed to facilitate the revitalization of contaminated lands in Ontario. Critics of the proposed law have been quick to point out that Bill 56 lacks sufficient and necessary liability protection and financial incentives required to make redeveloping brownfield properties a competitive alternative to focusing projects in greenfield lands.

If Canadian markets behave similarly to those in the U.S., Bill 56 may not provide enough impetus to push forward significant brownfield redevelopment in the long term. Examining the Bill against the backdrop of our analyses of U.S. legislation discloses some obvious gaps. Whether these gaps will have significant effect on a Canadian market remains to be seen.

However, the U.S. experience would tend to suggest that the seven elements identified above would make a significant contribution to the success of brownfields programs. We have examined below how Bill 56 compares to the desirable elements of brownfields programs discussed above.

Loans and grants: Bill 56 fails to provide financial incentives in the form of grants or loans. However, some federal programs already in place, such as the loan program through the Canada Mortgage and Housing Corporation (CMHC), could be used to provide the required funding and government guarantees. A federal policy directive would be required to enable CMHC to establish a brownfield sites program setting out qualification criteria, among other things. This type of mortgage insurance could achieve significant advances in making loan capital available from traditional banking sources.

Adequate liability protection: While liability protection has been offered in Ontario's Bill, it has been criticized as being very limited. The protection provided is only from the issuance of Ministry Orders (for example, remedial orders and pollution prevention orders) under the Ontario *Environmental Protection Act* and specified orders under the *Ontario Water Resources Act* and the *Pesticides Act*.

The liability protection does not extend to civil liability and is subject to exceptions and reopeners. Additionally, Bill 56 does not extend protection from Ministry Orders to any party that remediates contamination on adjacent properties (i.e. "off-site" contamination). Therefore, if a property owner completes remediation of contamination

on its own property and also remediates any contamination that has migrated onto adjoining lands, under Bill 56, the property owner would only receive protection from Ministry Orders for its own property, providing the owner with no protection from Ministry Orders for remediation performed on the adjacent property.

Responsible Party Protection: Under the regime proposed in Bill 56 (and depending on what the regulations will bring) the party responsible for contamination may only be able to enjoy the benefits of immunity provisions so long as they are the current owner and if he/she files a Record of Site Condition (RSC). In this scenario, there is little incentive for property owners to sell their brownfields to potential investors who are capable of carrying through a redevelopment project. Past owners, occupants, property managers, or persons exercising control over a contaminated property may not be able to escape liability through the subsequent sale of the property or gain the benefit of the immunity conferred by any RSC filed by such properties current owners.

Federal-Provincial Harmonization: There has been no agreement negotiated with the federal government wherein the federal government would “buy-in” to this proposed legislative system and provide liability protection from federal laws once a RSC is filed.

Tax Incentives: Tax incentives are available under Bill 56 only in limited circumstances and to a degree that falls far short of private sector expectations. The tax incentive offered under the Bill takes the form of municipal tax relief. Under Bill 56, the municipalities are given the authority to cancel property taxes for the period that remediation is undertaken and, if authorized by the Minister of Finance, to provide school tax relief. If any sustained impetus for redevelopment is to be achieved, these selective municipal tax incentives will need to be supplemented by a more broadly available federal initiative to provide relief under the Income Tax Act.

Risk Driven Remediation: The adoption of formal, consistent, risk-based action standards has more or less already occurred and Site Specific Risk Assessment will now be explicitly recognized in legislation as an appropriate remedial approach. The real innovation required will be the addition of expertise and resources to the ministry’s ranks.

Institutional Controls: Institutional controls form part of the regime proposed under bill 56. They have been introduced in the form of a Certificate of Property Use to be issued by the director and registered on title in certain circumstances. This, together with the yet-to-be reinvented Record of Site Condition, should provide an appropriate base for third party and future purchaser notification and to address the concerns of market participants in this regard.

The Ontario Legislature's introduction of Bill 56 is a significant first step towards brownfields redevelopment. There is, however, room for improvement both in Ontario, in terms of its proposed legislation, and in provinces elsewhere in Canada, many of which have yet to adopt any forward looking legislation. A more active federal government would also do much to improve the prospects for success of Canada's upcoming brownfields initiatives.

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