

The Brownfields Development Process

Jennifer T. Nijman

Effectively utilizing existing legislation concerning brownfields properties requires an understanding of the "process" established thereunder. The brownfields development process can be divided into seven steps: site identification; initial site assessment; economic assessment; a detailed site assessment; project development and finance; clean-up planning and execution; and finally, redevelopment of the property. Each of these steps is outlined below.

1. Site Identification

In order to find a location which has profit potential and lower risk, a matrix should be created which describes, for each state or area of interest, the federal, state and local legislation and programs available to assist in brownfields development. For instance, the matrix would include the nature of each state's voluntary clean-up program, available releases or covenants and their assignability, the state's history of issuing "no further action" letters, the speed of state



Jennifer T. Nijman

properties, using property tax rolls, using utility grid maps, and using relationships with local economic development people who may know of the properties.

2. Initial Site Assessment

Once the site is identified, the second step is to conduct an initial site assessment. Parties are generally familiar with the Phase I site assessment process, its costs (\$3,000 to \$10,000) and the types of information it contains. The scope of work for a brownfields Phase I should be carefully prepared to obtain as much information about the property as possible. A technical consultant should be a member of the transaction team to conduct the Phase I and to ultimately assess the contamination, the remediation and the costs associated therewith.

3. Economic Assessment

The third step in the process is conducting an economic assessment. The real estate needs to be profiled and valued as if it were clean. Next, the range of clean-up costs must be assessed. In addition to the technical analysis of the cost of clean-up, other considerations include the risks inherent in the state's voluntary clean-up program and the risk that the federal government would become involved in the project. It is essential to understand the potential end uses for the property in order to establish a rational range for the clean-up costs. For instance, parking lots are ideal end uses and can result in relatively low clean-up costs based on the nature of the parking lot as a remedial tool, i.e., a "cap." Manufacturing and distribution sites, warehouses, shopping centers and other commercial buildings can have similar results. Residential development of any type may severely impact the potential clean-up costs due to the manner of establishing risk-based clean-up levels for that type of future use.

The value of the property as contaminated should then be reviewed. The effort here involves reviewing the purchase price of the property, the clean-up cost, how long the clean-up process will take, and, finally, the incremental transaction cost due to technical and legal needs during the clean-up process. As noted above, a technical consultant should be part of the transaction team.

Another key member of the team will be environmental counsel to assess the various brownfields programs, to obtain available state and federal written assurances and financial incentives, and to be involved in clean-up negotiations.

4. Detailed Site Assessment

The economic analysis and the preliminary site assessment will determine whether the property is a "viable" or "threshold" site. Viable sites are those sites that have low potential for environmental liability or high rates of return so that the advantages outweigh the risks. In other words, there is limited contamination and a good economic evaluation. Threshold sites have more environmental risks or fewer advantages — the economic evaluation is not as good or there is more extensive contamination. In most cases, the preliminary investigation conducted on the property revealed an environmental issue or a need to more accurately assess the environmental risk because the property has fewer

"Residential development of any type may severely impact the potential clean-up costs due . . ."

economic advantages. The risk should be more thoroughly assessed through a detailed site assessment (Phase II) which would include sampling and analysis to develop an "accurate" cost estimate. Of course, the added cost of the detailed site assessment must be factored into the economic analysis. With threshold properties, there is a greater need for financing tools or other incentives to provide an acceptable rate of return. For instance, there may be money available to conduct the site assessment through state or local funding programs.

5. Project Development And Finance

At least two sources of financing will be required for a brownfields project. In order to conduct the property identification, initial site assessment and economic analysis, private funds or sources will likely be used. Once a remediation plan is developed and approved, bank financing can be obtained.

As a general matter, lenders are facing four principal risks in financing brownfields properties: (1) that the value of the property which secures the loan may diminish because of the discovery of significant contamination; (2) that the borrower cannot repay the loan because the borrower is paying for an expensive clean-up; (3) that the lender's mortgage may lose priority to environmental liens that supersede it by law; and (4) that the lender may be held liable as the owner or operator of property.

Various approaches are available to minimize the risks to a lender, including: assuring that a "no further action" letter is obtained for the property so that future buyers will not be concerned about future costs of cleanup; providing

an appraisal of the property which values the collateral after the cleanup so that a true picture of the value of the collateral emerges; having a future user ready to purchase or lease the property, ensuring income generation; obtaining a "not-to-exceed lump sum cleanup cost" bid from a reputable contractor; providing an executed escrow agreement to fund the remedial action; providing a certification that the remedial action plan can be implemented during site development in a manner that is consistent with construction plans; and locating the project in a state which has legislation protecting lenders and which has a memorandum of understanding with U.S. EPA so that U.S. EPA would not become involved unless exceptional circumstances exist.

Environmental insurance can also be used to minimize risks to lenders. Typically, policies provide coverage for clean-up costs incurred in excess of a pre-set stop loss amount, generally twice the projected clean-up costs. As a very general guideline, such a policy would cost approximately one to one and a half percent of the remediation cost for about a \$5 to \$10 million limit. Other policies include "cap" policies which insure cleanup beyond a certain level or "change in conditions" policies which protect against potential future changes in laws that may affect liability.

6. Clean-Up Planning And Execution

At this step of the brownfields development process, the goal is to establish reasonable clean-up levels consistent with the end use, obtain oversight by state agencies, and ultimately obtain contractual arrangements that are assignable upon successful completion (i.e., no further action letters and covenants not to sue). Legal assistance is required here to negotiate and document the state and federal contractual agreements. To be successful, any clean-up plan should be integrated with the future use so that the clean-up work only marginally increases the cost of the project. Obviously, most of the capital costs are expended at this stage.

7. Redevelopment Of The Property

The redevelopment of the property means implementing the ultimate end use. This step in the process may involve site clearance or demolition and construction of a new project or resale to the ultimate user. In any case, the redevelopment strategy must be developed early in the process so that the economic analysis, cleanup, and financing will succeed. The redevelopment strategy may include working with deed restrictions imposed to obtain lower clean-up levels. Such deed restrictions may affect the ability to resell or lease the property.

* * *

The brownfields programs are still fluid and capable of manipulation. With the appropriate team, including technical and legal assistance, and an understanding of the process, brownfields development can mean capitalistic, cost-effective approaches to deal with contaminated real estate.