Bar News - May 15, 2009

Environmental Law - Reassessing Brownfields Development

By: **By Kevin Baum**

The past year has not been kind to the real estate industry. After many years of significant growth, the economy and credit crunch have combined to significantly limit new real estate development. Further, many municipalities looking to combat sprawl caused by the real estate boom over the past decade are encouraging the reuse of properties within urban and village centers. Given this climate, the time is ripe to reassess the use of brownfields for real estate development opportunities.

Brownfields are generally defined as abandoned or underutilized properties where redevelopment is complicated by the presence or perceived presence of environmental contamination. Ironically, the brownfields problem is the result of one of the first major federal environmental laws to compel cleanup of polluted properties, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. Congress passed CERCLA in 1980 to compel the clean-up of several high- profile contaminated properties across the country, most notably Love Canal in western New York.

CERCLA imposes strict liability on anyone potentially responsible for environmental contamination of a property, with only a few limited exceptions. Past, present and even future owners of a contaminated property may be responsible for costs related to any investigation and remediation of the property regardless of their responsibility for the actual release. As a result, CERCLA and the corresponding state hazardous waste laws which substantially mirror the Act caused a significant increase in sprawl as developers, wary of liability for contamination caused during previous ownership, avoided brownfield properties for previously undeveloped or agricultural “greenfield” properties.

However, several amendments to CERCLA and the New Hampshire Hazardous Waste Management statute (Chapter 147-A) have made brownfields development significantly less risky. The New Hampshire Brownfields Program (Chapter 147-F) and Federal Brownfields Revitalization Act clarify the limited exception for “innocent” purchasers, those who did not own the contaminated property at the time of environmental release and did not otherwise contribute to contamination of the property. The amendments further provide several financial incentives for brownfield development through the funding and establishment of the Brownfields Cleanup Revolving Loan Fund, which provides low interest loans and grants to eligible parties.

Brownfield loans generally take the form of short term bridge loans to cover the cost of environmental cleanup activities by private entities while grants are available to certain public and non-profit entities undertaking environmental clean-up activities. Notably, the Fund is expected to receive an additional $1.8 million of federal funds through the American Recovery and Reinvestment Act.

The two exceptions from liability most applicable to prospective brownfield developers are the so-called “innocent landowner” and “bona fide prospective purchaser” exceptions. The innocent landowner exception applies to owners who can show that prior to acquiring the property they did not contribute to or have reason to know that any hazardous substance was disposed of on the property. In order for owners to show that they had no reason to know of the disposal, and avoid liability, they must undertake “all appropriate inquiry” into the previous ownership and uses of the property. Similarly, the bona fide prospective purchaser exception applies to landowners who, after conducting all appropriate inquiry, purchase contaminated property *with knowledge* of that contamination, provided that the environmental release occurred prior to their ownership and that they did not otherwise contribute to the contamination on the property.

Accordingly, proper due diligence is essential to avoid liability under either exception. Prior to 2002, there were no explicit regulatory requirements for conducting all appropriate inquiry, only that it be

"consistent with good commercial or customary standards and practices." However, in 2002, the EPA promulgated its all appropriate inquiry (AAI) rule. The AAI Rule generally codified the existing American Society for Testing and Materials (ASTM) guidelines which had been generally utilized to conduct environmental due diligence, but with some potentially significant changes.

The AAI Rule requires due diligence be performed by an experienced environmental professional and increases the scope of governmental and historical record review. Most notably, the more streamlined ASTM Transaction Screen standard previously used for less complex properties will not provide the innocent landowner or bona fide property purchaser protection. Therefore, proper due diligence requires at least a full-phase I environmental site assessment.

While there is no way for prospective brownfield purchasers to completely alleviate the risk inherent in brownfields development, several steps can be taken to significantly reduce liability and increase marketability of the property. First, environmental insurance may be available to cover the cost of cleanup and damages from unknown contamination. Brownfield owners may also seek policies to cover costs in excess of anticipated cleanup costs.

Further, federal and state agencies offer several vehicles which may provide additional assurance to potential brownfield property owners. Prospective purchasers may seek "comfort" or "status" letters from the EPA. These letters summarize the EPA's past actions and importantly, its future expectations for potential contaminated properties. Since these letters are not binding on the EPA, it is questionable how much "comfort" they actually provide. However, they may provide some clarification as to a property's Superfund status. The EPA may also enter into a Prospective Purchaser Agreement (PPA) with the prospective owner, which includes a covenant not to sue for any pre-existing contamination. Since the 2002 amendments, the EPA considers PPAs to be generally unnecessary and therefore, enters into PPAs on a very limited basis and only for sites where it has or expects to institute a Superfund response action.

Potential owners can also seek a covenant not to sue through the New Hampshire Brownfields Covenant Program. The Brownfields Covenant Program provides protection from environmental liability to prospective purchasers who agree to complete a site investigation and remediation. Where the site investigation reveals contamination, the purchaser must submit a remedial action plan (RAP) to the DES. Once that plan is approved, the Department of Justice will issue a covenant not to sue. Participation in the program does not obligate the purchaser to complete remediation of the property. The participant may transfer the covenant not to sue to other eligible parties or may otherwise cease cleanup activities.

However, the participant must stabilize the site to the satisfaction of the DES and may not leave the site in worse condition than before cleanup began to retain liability protection. If transfer is made before the completion of the RAP, the successor owner becomes a participant, receiving the benefits of the covenant, but subject to the requirements of the program. Anyone who takes ownership after the DES issues a certificate of completion likewise receives the full benefit of the covenant and although the program requirements will not apply, they may be subject to any continuing activity and use restriction on the property.

Importantly, the covenant protects only against liability for contamination addressed by the RAP and therefore, unanticipated contaminants may be excluded. However, such contaminants may be addressed through a pollution liability insurance policy.

Kevin Baum is an attorney with Devine, Millimet & Branch in Manchester and is a member of the Environmental and Real Estate Practice Groups. He can be reached at kbaum@devinemillimet.com.

New Hampshire Bar Association
2 Pillsbury Street, Suite 300, Concord NH 03301
phone: (603) 224-6942 fax: (603) 224-2910
email: NHBAinfo@nhbar.org