

THE BROWNFIELD NOUVEAU RICHE

More real estate players will be asking, "What can brown do for me?"

Bradley Cahoon



Cahoon

Individuals making money in real estate will likely consider the future of redeveloping brownfields, namely those many urban, stigmatized, fallow and often polluted industrial properties. Some estimate that there are more than 500,000 brownfields nationwide, located in virtually every state. The potential sites include abandoned steel mills, refineries, rail yards, ports, formally used defense sites (military bases), mines, landfills, chemical plants and gas stations.

Redevelopment projects range from placing chain drugstores on former corner gas station sites that had fuel leaking from underground storage tanks to residential mixed-use redevelopments on former Superfund sites (although Superfund sites are not legally considered brownfields).

The future for brownfield redevelopment looks brighter because the federal government and many state governments have changed environmental law to reduce environmental liability risk and encourage the practice. Under prior law, if I purchased the property knowing that it was contaminated, then I could be held jointly and severally liable for cleaning it up. Under modified federal and state laws, I can now purchase

property knowing that it is contaminated without becoming jointly and severally liable as long as I satisfy certain pre- and post-purchase requirements. To become a protected buyer, I will still need to conduct the standard pre-purchase Phase I environmental site assessment, which the EPA is in the process of modifying. That assessment will need to address risks posed by existing contamination and continuing obligations to maintain my buyer liability protection. Post-purchase, I may need to take reasonable steps to mitigate any threatened or continuing release like removing leaky underground storage tanks or other sources of pollution. However, the EPA has stated that the protected buyer does not need to remove contaminated soil or remediate polluted groundwater.

The changes in environmental law did not remove all of the risks associated with brownfields. Accordingly, pre-purchase due diligence should include confirming that there exists no unrecovered government cleanup costs, and a written assurance from the government that they have no unrecovered costs and will not assert any lien for that.

There is now buyer protection offered by insurance products to provide pollution legal liability coverage at more affordable rates. These policies can be used to insure against cleanup cost overruns, third-party personal and property injury claims, legal defense costs, claims arising from latent pollution or for contaminants that become newly regulated after the purchase. Unfortunately, pollution insurance does not remove all brownfield risks. The policies have limited coverage periods that generally vary from 5 to 10 years. They also may not insure against

institutional controls and restricted covenants that can limit future land use and impact redevelopment profits.

Federal, state and local governments give incentives to encourage brownfield redevelopment. Congress has made millions of dollars available through grants and low-interest loans administered by the EPA to state and local governments and non-profit organizations. There are also funds available from The Department of Housing and Urban Development and various tax incentive programs. The funding mechanisms usually require a public/private partnership or venture.

The zoning and land use entitlement process typically is streamlined for brownfield projects when compared to many greenfield developments that are becoming more difficult to entitle because of concerns about urban sprawl, preservation of open space, traffic congestion, water supply constraints and air pollution. Brownfield entitlement is more akin to a get-out-of-jail-free card. Boosting tax bases, creating jobs and increasing the housing supply within urban centers are benefits that usually outweigh other negative concerns associated with brownfields.

Successful brownfield redevelopers must assemble the right team of professionals. Ideally, the team should have an environmental consultant with engineering and geotechnical experience. The environmental consultant must address technical issues relating to any residual contamination and prepare a redevelopment plan that is protective of human health and the environment, something that environmental regulators care most about. Because these controls can be perpetual, it is impor-

tant to address them carefully upfront to avoid, if possible, having to modify them later. The team needs an experienced environmental lawyer who knows how to work with federal and state regulators, local government officials, zoning and public works departments, insurance brokers and underwriters, and, most importantly, the environmental consultant.

The redeveloper needs to develop a strategy for dealing with local government officials and staff and environmental regulators on issues relating to residual contamination, land use restrictions, institutional controls, access to and operation and maintenance of groundwater, contaminated soil management or removal, planting restrictions and the like. While the protected buyer may not be directly involved in many of these activities, the buyer will need to provide access to maintain liability protection. An exit strategy using an owners association that can enforce restrictive covenants and controls with local government enforcement backup is preferable to federal or state regulatory enforcement. If the local government supports the redevelopment plan, the redeveloper can maneuver more easily around roadblocks posed by environmental regulators.

Misconceptions about brownfield redevelopment vary from believing that brownfields pose no risks to think-

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ing that brownfields are still too costly and risky to consider for redevelopment. If handled carefully and properly, risks posed by brownfield redevelopment can be significantly reduced to maintain the margin between a discounted contaminated land purchase and redevelopment costs, on the one hand, and revenue derived from horizontal and/or vertical redevelopment, on the other hand.

Another misconception is that brownfield redevelopment cannot include residential land use. Many new redevelopment projects include a residential component. In fact, many plans include a new village concept of residential mixed-use. Further, location value drives brownfields like any other real estate project. Most brownfields are located in urbanized areas conveniently located to existing infrastructure. Configuring residential neighbors

inside brownfields works to revive urban communities dissipated by the suburban exodus following World War II. Brownfield redevelopment contributes to decreased traffic congestion and air pollution when people can live and work in the same community, and many redevelopments can be transit-oriented to facilitate convenient mass-transit choices.

With the apparent uptick in the real estate market, continued resistance to urban sprawl and more difficult entitlement processes, brownfield redevelopment should flourish. The two decades that followed the passage of the Superfund laws in 1980 primarily involved locating contaminated properties that posed threats to human health and the environment, attempting to cleanup those properties, and extensively litigating cleanup and recovery costs arising from those properties. The next two decades likely will involve returning polluted properties to productive reuse with collective efforts by private industry, environmental professionals, and local, state and federal government.

Bradley Cahoon is a partner with
Snell & Wilmer LLP
in Salt Lake City.