

Brownfields Basics - Redevelopment of Impacted Properties

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The Resource Conservation and Recovery Act (RCRA) Brownfields Prevention Initiative begun by the U. S. Environmental Protection Agency (EPA) in 2000 was designed to “use opportunities for statutory and regulatory flexibility in the Resource Conservation and Recovery Act to accelerate site cleanup, facilitate dialogue, and integrate reuse and redevelopment issues, as appropriate, into cleanup decisions.”

The goal is to accelerate cleanups at brownfields sites as a way to create jobs, businesses and green spaces for communities. In addition, the Agency’s brownfields objectives are to clean up contaminated sites through private funding, allow property transfers without transfer of liability for groundwater cleanup, and return idle property to productive use thereby reducing urban sprawl and blight.

To further facilitate these goals, a majority of the states have also implemented their own Brownfields programs expanding the scope of qualifying properties and often simplifying the overall process. One example we will look at here is Georgia’s program which was created by the Hazardous Site Reuse and Redevelopment Act.

These impacted properties are the remains from the sins of the past and a complete remediation or elimination of all contamination is often too difficult or expensive. Therefore, it is important for anyone considering the purchase of an impacted property to understand that brownfields redevelopment is about managing environmental risk reduction, not the total elimination of contamination.

What are brownfields?

Brownfields are defined as “real property, the expansion, development or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” Brownfields can also include sites contaminated by industrial chemicals, petroleum, or contaminated by past operations such as a dry cleaner.

Brownfields redevelopment is only as good as the real estate deal it supports. Like most states, Georgia’s approach to brownfields redevelopment recognizes that it is the considerations of the real estate deal and not contamination that drive redevelopment. Virtually any property is capable of redevelopment if the real estate deal itself otherwise makes economic sense. The Environmental Protection Division (EPD) recognizes that

timing is everything, but interested parties must understand that the sooner environmental issues are put on the table, the better it is for all involved.

Prospective purchasers and sellers alike are often confused by what is and is not covered under brownfields agreements. In Georgia, eligible Brownfields property purchasers include those with no contribution to the release and with no substantial business relationship with the responsible party. For example, the historical owner cannot “sell” a property to a new, related single-purpose entity just to obtain the protections of the Brownfield’s designation.

In addition, certain sites are excluded from taking advantage of the Brownfields program. For example, prospective purchasers of federal facilities cannot seek a Brownfield designation from the state. Additionally, sites which are listed on the federal National Priorities List or Superfund list must be addressed through the federal Comprehensive Environmental Response, Compensation and Liability Act (the Superfund law) and are excluded from Brownfields designation. Similarly, sites which have active hazardous waste facility permits under the federal Resource Conservation and Recovery Act or a similar state statute do not qualify either and must be addressed under that statute, although it may be possible to transfer some properties to Brownfields jurisdiction depending on the site’s specific condition.

Under Georgia’s Brownfields programs, the environmental work on-site must provide for protection of human health and the environment. However, there are significant benefits beyond the financial incentive to re-develop the property. These include a prospective limitation of liability if the criteria are met, tax incentives to offset the prospective purchaser’s investment in environmental remediation and the facilitation of redevelopment by the removal of traditional barriers to environmental risk management.

While any soil impacts measured above Maximum Contamination Levels (MCLs) or Risk Reduction Standards (RRS) must be addressed as part of the Brownfields application process, prospective purchasers can obtain limitation of liability for groundwater cleanup costs. That way, the suspected or known source of contamination in the soil is removed but the more expensive groundwater clean-up is significantly lessened or eliminated. The statute also provides for protection from third party claims. However, this third party liability protection has not yet been tested in Georgia courts. Similar protections in other states have been questioned for eliminating these third parties’ right to obtain compensation for impact to their adjoining properties. The question remains open as to whether this third party liability protection will survive in the Georgia courts.

Finally, prospective purchasers can also receive tax incentives to offset soil and source material cleanup costs incurred in or related to the Brownfields process. Of course, these benefits and protections granted through Georgia's Brownfield programs assume the state-sanctioned cleanup is in line with the federal Environmental Protection Agency's policies and revitalization goals.

HSI vs. non-HSI cleanups

There are two potential paths for a brownfield in Georgia even though there is no statutory distinction. The Brownfields Development Unit (BDU), also called the voluntary brownfield program is the group charged with regulating brownfield redevelopment. However, to avoid duplication with the Hazardous Site Response Program (HSRP), sites which have been listed on the state's Hazardous Site Inventory (HSI) by the HSRP are designated as HSI sites and must apply to for a brownfields designation through the HSRP program. All other environmentally impacted sites not listed as HSI are considered non-HSI sites and can apply to the voluntary program. Often, one must submit a release notification on a property to the HSRA group first to get a determination as to whether the property will be listed on the HSI in order to know which program to submit the Brownfields application.

The HSI Brownfield sites are properties on which the Hazardous Site Response Act requires some amount of remediation work to reduce exposure risks on the property. In general, the HSRP will require more investigation of the site to characterize the pollution and determine an appropriate response through an established HSRP process for achieving risk reduction standards. For a prospective Brownfields site, the first step may be an initial Compliance Status Report (CSR) submitted to EPD. Such an initial CSR is appropriate in cases where site conditions are well understood, the future land use is well established and certification of the appropriate risk reduction standard can be made without further cleanup. It also establishes a groundwater contamination baseline. From this point, the process is similar in both programs, although processing HSI sites takes significantly longer due to the added investigation and review required.

Prospective purchasers of both HSI and Non-HSI sites must submit a Corrective Action Plan (CAP) outlining the plan for addressing contamination on the site in order to obtain the Brownfields designation and protections. Their approval of the CAP will allow the prospective purchaser to close on the property and move forward with development. Later, typically after development, a final CSR will be submitted giving the current

conditions of the site and asking for approval for the site. Once the CSR is approved, the limitation of liability will be issued and effective to protect all prospective purchasers.

The benefits of legal counsel

The benefits of this legal-based approach to Brownfields redevelopment is that it reduces the purchaser's environmental risk and transactions can be made relatively quickly, which can result in reduced transaction costs. A prospective purchaser should first conduct a high-quality environmental site assessment (ESA) since liability limitation is linked to the ESA results. The process allows for time to become aware of any potential problems. It is important to keep in mind that purchasers are afforded no protection from liability for issues identified after the fact.

In general, the EPD supports early, informal communication which is very helpful for unveiling potential problems without running afoul of confidentiality agreements that may prohibit disclosure of environmental problems to third parties. While the goal may be to achieve results that accommodate the needs of all stakeholders, the reality is that many sellers afraid of an involuntary clean-up do not want to know about the environmental issues as such knowledge may trigger reporting requirements under the law. As such, informal discussion with either of the Brownfields programs may provide sufficient direction as to the likely issues which may arise in steering the site through the program. Nevertheless, because of the potential liabilities involved, purchasers are wise to consult with an attorney before seeking even informal advice from the State.

Legal issues associated with understanding brownfields laws and guidelines for purchaser transactions can differ by state and are best handled through legal representation. Consult the local bar association in your state and be sure to inquire about environmental law attorneys who specialize in Brownfields law.