

Other Environmental Issues in Property Redevelopment – It is not Just About Brownfields

By Martin A. Shelton, Esq.

Separate and apart from the typical Brownfields redevelopment issues that focus on the contamination of the property by hazardous waste, there are other environmental issues which should be considered. Some of these issues deal with regulated substances schemes which are well known though not always followed. Oftentimes, with the more intense regulatory focus on meeting Brownfields requirements, these issues can be left by the wayside. Of course, there are also those who intentionally ignore these issues as long as they get away with it where the attention of the regulatory agency is focused elsewhere. Nevertheless, these are all issues which should be assessed and dealt with proactively before they lead to regulatory action or litigation. Up front compliance should always be preferred to playing catch-up in response to either a public or private enforcement action.

Storm Water Discharges

Storm water is by far the most overlooked of these issues in any property development or redevelopment project and there has been a significant amount of litigation in both the Federal and Georgia courts. Often problems with discharges of storm water are bound up with erosion and sedimentation issues but there can be problems with discharges of uncontaminated water as well.

Any change in land use which increases the amount of impervious surface will increase the amount of storm water runoff from a site. Water runs downhill and unless the project is able to utilize significant natural seepage areas on-site, the water will be discharged off-site. For residential, commercial and retail development projects, the Clean Water Act only regulated storm water during construction with respect to erosion and sedimentation as discussed below. The actual regulation of uncontaminated storm water beginning during development and continuing on for the life of the property comes from local law. For example, in Georgia, the local counties and cities impose regulations requiring the post-development rate of water discharge be equal to or less than pre-development rates of flow without making any effort to restrict volume. Meanwhile, state law makes the increase in the volume of water or any alteration in the nature of the

water discharge illegal. The standard engineering practice is to address the rate of flow to meet the local regulations, without which the project will not be certified for occupancy, and to direct all of the increased volume to the lowest spot on the property irrespective of whether water ever flowed there before. This may not present a problem where there is a stream on the site. However, significant problems arise when the discharge is turned out at the property line. Often, the adjoining property owner is unhappy that a new stream channel is being directed across their property.

A related issue arises from poor erosion and sedimentation practices that lead to discharges of sediment which is a pollutant under the Federal Clean Water Act. The Act regulates such discharges by requiring monitoring in addition to structural and vegetative measures designed to prevent the escape of the pollutant known as Best Management Practices (BMPs). Although regulated by the State under the Clean Water Act, enforcement is left up to the local governments which may not have the resources to pursue violations on all sites. No matter what level of enforcement is undertaken by the City or County, discharges may still occur which would impact adjoining properties or watercourses. Moreover, any such regulation or enforcement cannot be used as a defense to any claims by other impacted off-site property owners. As such, the best defense to such claims is aggressive site specific BMPs and BMP maintenance on property during all phases of the project.

Excess Soil and Construction Debris

Too often people tend to think dirt is dirt, when it can under certain circumstances be considered a solid waste. Excess soil can be used as fill on the site or on other sites assuming there is no contamination in the soil. However, if the soil is stockpiled on site, it must not be mixed with other wastes or the combination will be a solid waste. Organic wastes such as trees, brush and other solid waste must be disposed of at a permitted inert landfill. If such materials are mixed with dirt stockpile on the site, the stockpile itself becomes a disposal site most likely to be deemed a small, inert solid waste landfill. Although the permitting requirements for inert waste landfills in Georgia are less stringent than for municipal or commercial solid waste landfills, these requirements must still be carefully considered if one chooses to dispose of such organic wastes on-site. For example, an inert waste landfill must be setback a certain distance from adjoining properties and as such the waste stockpile should not be located close to a property line.

Similarly, construction debris must be disposed of in a permitted Construction and Demolition debris landfill since on-site burial of these materials has not been allowed since 1997. Of course, any hazardous wastes such as cleaning solvents and used oil or fluids from equipment must be properly disposed of in a credible hazardous waste landfill.

Asbestos and Lead-based Paint

Where the property redevelopment includes the removal or renovation of historical structures on the site, the potential presence of asbestos and lead based paint must be considered. Asbestos removal and disposal is regulated independently of other substances which may be hazardous. In fact, it is not regulated under federal law, but many states treat certain types of asbestos (friable) as hazardous materials. In Georgia, developers must use licensed asbestos contractors who follow mandated safety procedures such as use of respiratory protection (e.g., titek suits), specific containers and special handling. Proper disposal requires use of an approved facility for asbestos waste. However, where the building or structure is to be preserved in the redevelopment plan, encapsulation may be an option as well.

Similarly, the EPD requires that removal and disposal of lead-based paint be performed by certified lead-based paint inspectors, risk assessors and workers. Abatement projects require notification to EPD and specific procedures must be followed related to inspection and testing as well as soil sampling in potential outdoor play areas. Abatement involves safety measures similar to asbestos designed to prevent air migration. The big difference is the potential for soil removal where lead from the paint has contaminated the surrounding ground. Such soil removal actions follow the applicable hazardous waste site procedures but with different standards. Again, as with asbestos, proper disposal in an approved facility is required, although encapsulation, including soil cover instead of removal may be considered.

Legal issues associated with understanding such environmental considerations in development 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 environmental compliance.