

**BROWNFIELDS REDEVELOPMENT:
A MUNICIPAL PERSPECTIVE**

By:

Ali Abazari

**Lloyd Gosselink Blevins Rochelle & Townsend, P.C.
816 Congress Avenue, Ste. 1900
Austin, Texas 78701**

**Texas City Attorneys Association Semi-Annual Meeting
South Padre Island, Texas
June 16, 2006**

I. Introduction

In almost every city you visit, you can see tracts of contaminated land, large or small, fenced-off from the outside world. Sometimes there is an actual fence that isolates the site, and other times, the fence is perceived.

Often referred to as "brownfields," these properties contribute to urban decay by facilitating the underutilization of land. Brownfields are "abandoned, idled, or underutilized industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived contamination."

In addition to being unsightly, these sites are often a source of attraction for vandalism, graffiti, and fires. From an economic standpoint, these vacant lots cost thousands and sometimes millions of dollars in lost tax revenues, as well as thousands of jobs. They also force new development out of the cities, increasing sprawl and the cost of supporting infrastructure.

These sites can be abandoned manufacturing, warehousing, or operating plants that show signs of pollution. They can be railroad yards. They can be commercial properties like old dry cleaners or gas stations. In some cities, brownfields can even be residential lots with only suspected contamination from a former use, or from actual contamination that has migrated from an industrial or commercial site.

While most brownfields are not of the type that we read about, they nevertheless, present challenges for local governments, businesses and investors, and regional communities. However, the analysis does not end with the challenges that these sites create. These sites also present opportunities for those same entities.

Redevelopment of these sites creates challenges associated with legal liability for investigation and remediation, (and the associated complexities of regulatory requirements for

performing those acts), and financing for redevelopment.

On the other hand, brownfields redevelopment also offers considerable opportunities that can produce positive environmental, economic, public safety, and neighborhood revitalization benefits. For the public sector, brownfields redevelopment promotes better environmental quality, better public health, neighborhood revitalization and reduced urban sprawl. For the private sector, brownfields redevelopment creates the potential for profit from an undervalued source of property in established communities with established infrastructures in place.

Despite these many benefits, businesses avoid developing contaminated sites. Various governmental reports have indicated that this avoidance is due, for the most part, to fears of legal liability and the excessive and uncertain costs of environmental investigation and remediation. As a result, federal, state, and local governments have made numerous efforts to encourage redevelopment of brownfields by attempting to reduce the environmental liability fears and the costs associated with environmental investigation and remediation.

Although efforts to encourage urban renewal through the redevelopment of brownfields are occurring in various forms throughout the country through federal and state efforts, those efforts do not appear to be achieving maximum results. While the reasons for this may be plentiful, one particular reason that those efforts are not accomplishing their stated goals is due to the level of effort put forth by the local governments wherein these sites are located.

Local governments are at the forefront of the challenges and opportunities created by the brownfields site and have historically controlled the fate of these sites because of their ties to land-use processes. Furthermore, the challenges faced by the owner of a contaminated site that cannot sell his property, necessarily become the challenges, and in essence, the problem of the municipality wherein that property is located. Similarly, the benefits received by the developer

that has redeveloped an idle site, necessarily benefits the municipality. Thus, there is a key incentive for the local government to partake in brownfields redevelopment.

This paper discusses the environmental barriers to brownfields redevelopment, the federal and state initiatives to encourage redevelopment of brownfields, the various sources of funding such projects, and the role of the local government in brownfields redevelopment.

II. Barriers to Brownfields Redevelopment

The barriers associated with brownfields redevelopment are well known and almost every paper written on this subject matter discusses the problem in the same way. According to those discussions, the risk of liability for cleanup costs due to a liability scheme imposed by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹ created the brownfields problem, and has served as the most important barrier to the redevelopment of these properties.

CERCLA was enacted in 1980 in the wake of public concern over a few properties from which hazardous substances were being released into the environment, and posing a human health risk.² Existing laws were perceived to be inadequate for holding those responsible for creating these sites liable for the costs of cleaning them up. Based on the number of sites that sat idly as the environmental issues persisted, the perception seemed to have a basis in fact. CERCLA was enacted to fill the void by making a new group of persons responsible for cleaning up these sites. CERCLA established a scheme in which a member of any one of four

classes of potentially responsible parties might be held liable for cleanup costs. The four classes include: (1) current owners and operators of the site; (2) owners and operators at the time of disposal; (3) persons who arranged for disposal of the waste; and (4) persons who transported hazardous waste to the site.³ Under the first category, the current owner or operator, was liable even if the hazardous substances were disposed on the property before the current owner took title.

Based on the purpose for which CERCLA was enacted, courts often construed CERCLA liability liberally to insure the U.S. Environmental Protection Agency's ("EPA") ability to meet CERCLA's implementation costs "at the primary expense of private responsible parties rather than taxpayers."⁴

Furthermore, the liability under CERCLA is strict, and although not mandated, it often imposes joint and several liability for the costs of remediation of the contaminated property on the responsible party(ies).

Although CERCLA provides certain limited defenses to its strict liability scheme, historically, it has been quite difficult for current owners to maintain any of the defenses.

The limited defenses offered to a current owner of contaminated property include a showing that the contamination was solely caused by an act of god, act of war, or the act of a third party. Since act of god and act of war are rarely invoked and are irrelevant to this discussion, they will not be discussed here.

Under most jurisdictions, to claim the third party defense, a property owner must establish that (1) the releases of hazardous substances was caused solely by a third party; (2) the owner does not

¹ 42 U.S.C. §9601 *et seq.*

² The Texas version of the Superfund Law was enacted in 1989 and like its federal counterpart the state legislation establishes liability that is strict, joint and several meaning that any responsible party can be held fully liable for all contamination on a site. The list of responsible parties is the same as those identified under the federal statute, discussed *infra*.

³ *Id.* at §9607.

⁴ *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 349 (D.N.J. 1991); *See also Uniroyal Chem. Co., Inc., v. Deltech Corp.*, 160 F.3d, 238, 257 (5th Cir.1998); *See also General Elec. Co. v. AAMCO Transmission, Inc.*, 962 F.2d 281, 285 (2d Cir. 1992).

have a contractual relationship with the third party that caused the contamination;⁵ (3) the owner took reasonable precautions against the acts or omissions of third parties; and (4) the owner exercised due care regarding hazardous substances at the property.⁶

The “third party defense” turned out to be inadequate for a person that wanted to invest in brownfields redevelopment projects because the real estate transaction in which the property was acquired constituted a “contractual relationship” between the buyer and seller.

Congress first recognized this problem with CERCLA in 1986 when it introduced the “innocent landowner defense” as part of the Superfund Amendments and Reauthorization Act (“SARA”). SARA did not eliminate the “contractual relationship” language, but instead added new language that created a defense despite the existence of a “contractual relationship.” Under the defense, a prospective purchaser could gain “innocent landowner” status as long as he had no reason to know that any hazardous substances were disposed of on the facility. To qualify for this defense, however, the person had to demonstrate that “all appropriate inquiries” had been undertaken into the previous ownership and uses of the property. Therefore, to qualify for the defense, the prospective purchase had to perform an inquiry into the use of the property prior to its purchase. If the property was determined to be contaminated, then he could not qualify for the defense. On the other hand, if the property was determined to not be contaminated and the person had no reason to believe that it was contaminated, he could qualify for the defense, if the property was later found to be contaminated.⁷

⁵ A limited number of courts require a showing that the act or omission that caused the release was not “in connection with” a contractual relationship. While this line of reasoning is more consistent with the language of CERCLA, it is not the majority view.

⁶ 42 U.S.C. 9607(b).

⁷ Of course, under this scenario, one must get over the hurdle of whether the “all appropriate inquiry”

The result of this was that demand often dropped considerably for properties that possibly fell within the scope of CERCLA liability. Of course, this is not to suggest that the real estate market for potentially contaminated properties was shut down, as buyers were still able to negotiate price reductions and reduce such environmental risks through contractual means; however, it is intended to suggest that it became much easier to walk away from the table if such contamination was a possibility. Without doubt, CERCLA led many to walk away from such deals and consider properties that did not have environmental issues.

III. Overcoming the Barriers to Brownfields Redevelopment—Federal and State Initiatives to Encourage Redevelopment

Numerous initiatives have been undertaken during the past several years to encourage the redevelopment of contaminated properties. These initiatives can generally be grouped into liability relief, financial incentives, or means by which investigation and remediation costs can be reduced (i.e. risk based investigation and closures, and the Municipal Setting Designation statute, described infra).

A. Federal Initiatives

In 2002, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (the “Brownfields Act”)⁸ which provides key clarifications regarding certain defenses and made available significant additional funding for both the investigation and cleanup of brownfields sites.

The Brownfields Act modifies CERCLA to encourage brownfields redevelopment by providing liability relief to certain qualified individuals, and by providing funding to state brownfields programs and to local governments

was in fact “all appropriate” since it did not discover contamination that, in fact, existed.

⁸ P.L. No. 107-118, 115 Stat. 2356.

who seek to return contaminated properties to productive use.

Title II of the Brownfields Act codified certain defenses to CERCLA liability for owners of property contaminated with hazardous substances. These defenses included the innocent landowner, bona fide prospective purchaser, and contiguous property owner defenses.⁹ Most relevant to this discussion is the defense available to a bona fide prospective purchaser ("BFPP"), so only that defense is discussed here.

1. CERCLA Defense: Bona Fide Prospective Purchaser Defense

As noted above, prior to the Brownfields Act, the dilemma of the prospective purchaser was this: for a landowner to successfully assert the innocent landowner defense, he had to demonstrate that he did not know, nor have reason to know that the property was contaminated. Brownfields sites are by definition contaminated, thus this defense was of no use to a prospective purchaser who wanted to redevelop a brownfields site. Because no statutory defenses were available to the prospective purchaser, the transaction would often stall. To remove this hurdle, the Brownfields Act created the bona fide prospective purchaser defense. According to this defense, a landowner can *knowingly* acquire contaminated real property and avoid CERCLA liability.

To successfully assert this defense, it must be demonstrated that:

- All disposal of hazardous substances occurred before the purchaser acquired the facility.

⁹ The Brownfields Act does not provide protection for a bona fide prospective purchaser, innocent landowner, or contiguous property owner from EPA actions brought under RCRA 7003, citizen suits brought under RCRA 7002, and RCRA corrective action orders.

- “All appropriate inquiry” was conducted by the prospective purchaser.
- The purchaser provided all legally required notices with respect to the discovery or release of any hazardous substances.
- The purchaser took appropriate care by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
- The purchaser provided full cooperation, assistance, and access to persons conducting response actions.
- The purchaser complied with land use restrictions that are part of the response action and does not impede the effectiveness or integrity of any institutional control used at the sites
- The purchaser complied with any request for information or administrative subpoena issued under CERCLA.
- The purchaser established that it is not a liable party or affiliated with any other potentially liable parties through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that as a potentially liable party.¹⁰

As is evident from this discussion, in order to avail oneself of this defense, a purchaser has certain obligations at the time of the purchase, and certain continuing obligations after the purchase. For example, the BFPP will have to exercise “appropriate care” to “take reasonable steps” to stop existing releases and prevent any threatened future releases. These requirements are in addition to taking “all appropriate inquiry” and are, in fact, *after* the buyer takes title to the land.

The continuing obligations under the BFPP are not well defined, so there is much uncertainty regarding qualification under this defense. The

¹⁰ 42 U.S.C. 9601(40).

uncertainties associated with this defense (and the other defenses codified and/or modified under the Brownfields Amendment, i.e. the "innocent landowner defense" and "the contiguous property owner defense") have led many, including this author, to conclude that this federal initiative will do very little in terms of encouraging brownfields redevelopment.

The funding made available under the Brownfields Act is perhaps the most significant contributor to responding to the brownfields dilemma. Available funding, including funding made available under the Brownfields Act is discussed in Section IV.

2. Exclusions From CERCLA Liability

The next set of tools worth noting that can help reduce environmental risk in dealing with contaminated properties is a group of exclusions from liability that exist for lenders, fiduciaries, and others involved in certain financing arrangements.

For the most part, lenders have three concerns when it comes to brownfields redevelopment: (1) proper estimation of the market value of the property, (2) retaining the value of the property which is held as collateral; and (3) being held liable as an "owner" because it holds title to collateral, or being held liable as an "operator" because it takes actions it deems necessary to protect the value of its collateral or to foreclose on that collateral. This section addresses the third concern.

The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (the "Lender Liability Act")¹¹ provides protection to lenders (including banks, individuals who make loans to nonaffiliated persons, and loan guarantors) from liability under CERCLA as long as they do not "participate in management" of the facility on which they hold a loan. Lenders also are exempt from liability if they did not "participate in management" of a facility

¹¹ See 42 U.S.C. 9601(20)

on which they subsequently foreclose and then make timely, commercially reasonable efforts to sell, re-lease or otherwise divest. The mere capacity to influence, or the unexercised right to control, operations of a facility do not confer liability on the lender. Rather, to be found liable, while the borrower is still in possession, the lender would have to exercise decision-making control over the facility's environmental compliance or otherwise exercise substantial control over all of the facility's operations.

As for fiduciaries (which include most parties who act as trustees, executors, and administrators)¹² they are protected from personal liability unless they are negligent or they cause or contribute to the contamination. In most circumstances, a fiduciary's liability will not exceed the assets held in the fiduciary capacity.

The state law mirrors the federal requirements with respect to lender and fiduciary liability.¹³ Note that both the state and federal lender liability protections extend to most lease-finance transactions.¹⁴ The applicability of these provisions to lease-finance arrangements creates significant opportunities for cities or other entities that may desire to act as a conduit for economic development funds to a redevelopment project but are required to hold title to the property to qualify for funding. In those situations, the city or other grant recipient could hold title solely as a security interest via a lease-finance transaction in which the redeveloping party is the lessee who will ultimately take title to the property after satisfying the terms of the lease-finance arrangement. Because, with very limited exceptions, such a transaction fits within the statutory definition of "extension of credit," the exclusion of liability can apply and protect city or other grant recipient from superfund liability.

¹² *Id.* at §9607(n).

¹³ TEX. HEALTH & SAFETY CODE, Chapter 361, Subchapters T and U.

¹⁴ See definition of "extension of credit" at TEX. HEALTH & SAFETY CODE §361.701(1). & 42 USC § 9601(20)(G)(i).

In the right circumstances, this can be a very powerful brownfields redevelopment tool.

3. Tax Incentives

Originally signed into law in August 1997,¹⁵ and later amended on December 21, 2000,¹⁶ the Taxpayer Relief Act, which included the Brownfields Tax Incentives¹⁷ allows eligible taxpayers to deduct certain environmental cleanup costs at eligible properties, within the year they were incurred, rather than having those costs capitalized over time. The tax incentives apply to properties that meet both land use and contamination qualifications. To satisfy the land use requirement, the property must be held by the taxpayer incurring the eligible expenses for use in a trade or business or for the production of income; or the property must be included in the taxpayer's inventory. To satisfy the contamination requirement, the taxpayer must demonstrate that there has been a release, threat of release, or disposal of a hazardous substance at the property.

B. State Initiatives

State initiatives for the redevelopment of contaminated properties include liability relief for certain individuals, reduction of costs associated with investigation and remediation of contaminated groundwater under certain conditions, and tax incentives. This section discusses these state initiatives.

¹⁵ Pub.L. No. 105-34.

¹⁶ Pub.L. No. 106-54.

¹⁷ The 1997 Act only covered expenditures at properties that met specific land use, geographic, and contamination requirements. To expand the use of the tax incentive, the geographic requirements were eliminated when the Act was amended on December 21, 2000, leaving only land use and contamination qualifications for expenditures on or after December 21, 2000. However, expenditures prior to that date (and on or after the incentive's effective date of August 5, 1997) must have been paid or incurred at properties that also meet the geographic conditions.

1. Texas Voluntary Cleanup Program

In 1995, the Texas legislature enacted the statute authorizing the Voluntary Cleanup Program ("VCP").¹⁸ The VCP was designed to encourage parties to voluntarily conduct investigation and remediation activities on their properties. The VCP accomplishes this goal by providing incentives to remediate property by removing liability of lenders and future landowner.¹⁹ The VCP was also intended to assist the owner of impacted property to address the contamination on his property more promptly than might be the case if the party was going through the Corrective Action of the Texas Commission on Environmental Quality ("TCEQ").²⁰

Upon meeting the eligibility criteria for entering into the VCP, which basically includes any site except those that are subject to TCEQ permit or order,²¹ payment of a \$1,000 application fee, and entering into a voluntary cleanup agreement,²² a party may enter into the VCP. After completion of the TCEQ-directed cleanup, the TCEQ will issue a certificate of completion,²³ which essentially states that all non-responsible parties are released from all liability to the state for areas that were addressed by the certificate.

The VCP affords the seller an opportunity to make his property more marketable by providing for liability waiver from state enforcement

¹⁸ TEX. HEALTH & SAFETY CODE 361.601 *et. seq.* Regulations promulgated pursuant to this statute are contained in 30 TEX. ADMIN. CODE Chapter 333, Subchapter A.

¹⁹ *Id.* at 361.602.

²⁰ Whether the VCP has been successful in accomplishing this latter task is debatable given the backlog that has developed in the VCP.

²¹ *Id.* at 361.603.

²² *Id.* See also *Id.* at 361.606.

²³ A certificate of completion is essentially a sign-off by the TCEQ on all the contaminants on-site for the area covered under the certificate.

actions for the purchaser of the property.²⁴ Since the non-responsible parties (including the purchaser and future owners) receive protection from liability from the State, many of the barriers to consummating a real estate transaction are lifted and thus, redevelopment becomes more likely.

As a practical matter, the VCP allows a person to place a site into the VCP and transfer ownership of the property before cleanup is completed.²⁵ So long as the cleanup is completed as specified in the VCP agreement, a buyer may take over the property and have the certificate of completion issued to protect the buyer as if the certificate had been issued before the purchase.²⁶

This is particularly useful if the seller is willing and able to provide some indemnification to a brownfields redeveloper who is willing to accept the risk of delay if additional problems are encountered. This is also a particularly useful tool when groundwater contamination is involved that will take a number of years to fully remediate. Surface redevelopment can move ahead with reduced financial risk to the developer and lenders while groundwater remediation might continue for years without impacting the surface development.

In circumstances where the purchaser is not a co-applicant and it is feasible to obtain a “conditional” certificate of completion prior to taking title to the property, a purchaser may still take title of the property and later receive immunity from liability effective from the date of the conditional certificate of completion if a

²⁴ While the liability waiver applies to the purchaser, not the owner, the owner of the property is free from TCEQ enforcement action as long as he is in the VCP and complying with the VCP agreement.

²⁵ In order to be eligible for such a “back-dated” liability waiver, the purchaser of the property must be a co-applicant on the VCP application prior to taking title to the property.

²⁶ TEX. HEALTH & SAFETY CODE §361.610.

final certificate of completion is ultimately issued.²⁷

2. Texas Innocent Owner/Operator Program

Another statutory immunity from liability that can reduce risks, facilitate transactions, and even resolve disputes with adjacent property owners is found in the Innocent Owner/Operator Program (“IOP”). The IOP was enacted in 1997, two years after the VCP was enacted.²⁸

The IOP affords protection from liability for contamination that originated off-site on adjacent properties, but migrated onto the “innocent owner/operator's” property. The innocent owner/operator can obtain a certificate from the TCEQ documenting his innocent status. Although the immunity will apply in the absence of an IOP certificate, it is generally advisable to obtain a certificate in order to confirm that the TCEQ acknowledges the applicability of the immunity.

It is not generally a prerequisite that the owner asserting the defense purchased the property without knowledge of the contamination after conducting an environmental due diligence investigation. In fact, the only situation where it is a prerequisite of the IOP immunity to have no knowledge of the contamination after conducting a pre-purchase investigation of the property is when the property in question was a portion of a tract containing the source of contamination and the property is purchased from a person who caused the release. In such a situation, the person must demonstrate that after “appropriate inquiry consistent with good commercial or customary practice, he did not know or have reason to know of the contamination on the property at the time of the purchase.

²⁷ *Id.* and 30 TEX.ADMN.CODE § 333.10.

²⁸ TEX. HEALTH & SAFETY CODE §361.751 *et seq.*; *see also* 30 TEX. ADMIN. CODE Chapter 333, Subchapter B.

3. Involuntary Acquisition of Property

A political subdivision is not liable for environmental contamination if it acquired ownership or control of the facility or site through bankruptcy, tax delinquency, abandonment, or other circumstances which the subdivision involuntarily acquired title to the property, and it did not cause or contribute to the contamination.²⁹

4. Municipal Setting Designations ("MSDs")

The Texas MSD Bill, HB 3152, was signed into law by Governor Perry on June 20, 2003, and became effective on September 1, 2003.³⁰ The stated purpose of this new law is the reduction and elimination of groundwater investigations and response actions for certain properties with contaminated groundwater.³¹

The MSD bill, while considered a brownfields initiative like the ones noted above, is unlike the above-referenced reforms, in that it does not attempt to address the issue of "who is liable;" but rather it addresses the cost of liability.

In Texas, remediation of contaminated environmental media (including groundwater), for certain sites, can be conducted in accordance with risk-based standards.³² Proper application of risk-based methods can conserve resources by balancing true risks with the cost of cleanup or other actions.

Generally, the requirements of a risk-based cleanup program, including the Texas versions,

²⁹ TEX. HEALTH & SAFETY CODE §361.271(B)(1); and

³⁰ TEX. HEALTH & SAFETY CODE, Chapter 361, Subchapter W.

³¹ TEX. HEALTH & SAFETY CODE §361.802

³² See Risk Reduction Standards, 30 TEX. ADMINISTRATIVE CODE Chapter 335, Subchapter S; and Texas Risk Reduction Program ("TRRP") 30 TEX. ADMINISTRATIVE CODE Chapter 350.

include methods and procedures for identifying the source of a discharge or release, determining the nature and extent of contamination, characterizing the risk posed to human health and the environment, and performing corrective action to reduce levels of contamination.

The determination of the nature and extent of groundwater contamination along with the reduction of contaminant levels in groundwater are most often the cost drivers for site cleanups (if groundwater has been impacted).

If there is no foreseeable use for the groundwater, and if the property owners of the contaminated property(ies) can be provided with potable water, and if the existence of the contaminated groundwater does not harm human health, does it make sense to pursue unnecessary investigation and remediation of that groundwater? The MSD bill says "no."

The legislation makes two findings: (1) access to and the use of groundwater may need to be restricted to protect public health and welfare where the quality of groundwater presents an actual or potential threat to human health; and (2) an action by any municipality to restrict access to or the use of groundwater in support of or to facilitate a municipal setting designation advances a substantial and legitimate state interest where the quality of groundwater subject to the designation is an actual or potential threat to human health.³³

These provisions make it clear that the Legislature believes that such designations and the ordinances and zonings that go along with those designations are an appropriate exercise of power by the TCEQ and Texas city governments, respectively.

To further clarify the authority of local governments to take the actions contemplated by the MSD process, key provisions were added to the Local Government Code by the

³³ *Id.* at §361.8015.

Legislature.³⁴ While these provisions will not prevent legal authority challenges or takings claims from being alleged, they should go a long way to deter the filing of such claims and improving cities' legal grounds for participating in the MSD process for the legitimate purposes clearly set out in the Legislation.

The MSD statute authorizes the TCEQ to create Municipal Setting Designations ("MSDs") for specific geographic areas and designated groundwater. Once an applicant can establish that the site is eligible, groundwater use has been appropriately restricted by the relevant municipality, and other specified parties are supportive of the designation,³⁵ TCEQ is

³⁴ . . . "The governing body of a municipality may regulate: . . . (6) the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health." Local Government Code § 211.003 (a)(6) (Zoning Regulations Generally).

. . . "The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads or the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health. Local Government Code § 212.003(a) (Extension of Rules to Extraterritorial Jurisdiction)

. . . "For the purpose of establishing and enforcing a municipal setting designation, the governing body of a municipality may regulate the pumping, extraction, or use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, to prevent the use of or contact with groundwater that presents an actual or potential threat to human health. (b) For the purpose of establishing and enforcing a municipal setting designation, the governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under this section. Local Government Code § 401.005(a) (Restriction on Pumping, Extraction, or Use of Groundwater).

³⁵ The following entities are entitled to notice of and comment on the proposed designation:

- Each municipality(ies) that contains the property for which designation is sought;
- Each municipality(ies) located within ½ mile of the proposed designated property;
- Each municipality(ies) that own or operates a water supply well within 5 miles of the proposed designated area;

empowered to certify the area as an MSD. As a result of the designation, a party conducting a response action on property within the designated area would no longer have to conduct an investigation or cleanup based on the assumption that the designated groundwater will be used in a way outlawed by the municipality in question, as described below.

A site is eligible to be designated as a municipal setting, if the property or properties are located within a city of at least 20,000 residents, an alternative public drinking water supply is available, and the property is subject to a municipal ordinance or resolution (coupled with a restrictive covenant) appropriately restricts other uses of groundwater from beneath the property. The Executive Director of the TCEQ has ultimate discretion in granting a designation, but must deny an application if the MSD would negatively impact the current and future regional water resource needs or obligations of the area or surrounding area where the MSD is sought. Those types of issues are likely to be brought to light by the many parties entitled to notice of, comment on, and, in some cases, veto the proposed designation.

Once an MSD certificate has been issued, site investigation and response actions may or may not be required by TCEQ, as follows:

a. **No Potable Water Supply Wells Located within 1/2 Mile of Proposed Designation**

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- Each retail public utility that owns or operates water supply well within 5 miles of the proposed designated area; and
 - Each registered private well owner with a well within 5 miles of the proposed designated property.

The first four categories of notice recipients are given effective veto power over the designation because an applicant cannot obtain a designation if an ordinance or resolution, depending upon the circumstances, has not been received from the governing bodies in support of the proposed designation.

According to the statute, under this scenario, there is no requirement to investigate the nature and extent of contamination in groundwater or conduct response actions to remove, decontaminate, or control environmental impacts to groundwater based solely on potential potable water use.³⁶

In practical terms, this means that the TCEQ will not require the applicant to conduct site investigations or response actions related to protection of human exposure via potable water use. Under the Texas Risk Reduction Program ("TRRP"), this would most likely eliminate the need to investigate and cleanup the groundwater based on Protective Concentration Levels ("PCLs") for ingestion of groundwater. However, other PCLs associated with non-consumptive groundwater use, i.e. inadvertent contact with affected groundwater, or other human or ecological exposure pathways could still apply.

b. If Potable Water Supply Wells are Located within 1/2 Mile

The TCEQ can require the person responsible for the corrective action in the MSD boundary to determine if contamination emanating from the subject property could cause applicable human health and ecological protection standards to be exceeded within an area located within 1/2 mile outside of the MSD. If this evaluation shows no present or reasonably anticipated exceedance of these standards, then no further response actions will be required within the MSD, except as otherwise needed to protect human health or ecological receptors not related to groundwater ingestion, as discussed above.

However, if this evaluation indicates that human health or ecological standards are presently exceeded or could reasonably be exceeded in the future within a 1/2 mile distance *outside* the MSD, then the TCEQ can require additional response actions.

³⁶ TEX. HEALTH & SAFETY CODE § 361.808(a) and (b) (Vernon 2001 & Supp. 2004).

The response action can include:

- Removal, decontamination, and/or control of groundwater impacts inside the MSD to meet all applicable human health or ecological standards outside the MSD, including groundwater ingestion; or
- Removal, decontamination, and control measures inside the MSD as needed to address exposures not related to groundwater consumption both inside and outside the MSD *and* either
- replacement of impacted potable water wells with a satisfactory alternative water supply, in conjunction with restrictive covenants protecting against future unsafe groundwater use, or
- expansion of the MSD area to incorporate the properties on which impacted water supply wells are located.³⁷

The MSD legislation has the potential to fundamentally change the requirements for investigation and cleanup of contaminated groundwater that have been established by the TCEQ's risk-based cleanup programs over the years. Most importantly, the MSD applicant may no longer be required to consider ingestion of groundwater as a complete pathway, and thus may be excluded as a risk factor. Considering that the ingestion of groundwater is often the driving force behind the investigation and cleanup of groundwater, there is a great amount of incentive to pursue an MSD.

³⁷ Regardless of any exclusions provided for the MSD, the law specifies that nothing in the statute or rule is intended to i) affect the right of any person to pursue claims with regard to personal injury or property damage or ii) relieve the person responsible for the corrective action from other requirements that may apply under a federally authorized environmental program administered by the state of Texas (e.g., RCRA or CERCLA regulations).

An understanding of the MSD legislation will prepare municipalities for requests that are likely to be brought to eligible cities throughout the State by members of industry and developers seeking to facilitate redevelopment of contaminated sites. The MSD process should also prove advantageous to cities that have properties they own or operate that are facing expensive investigation and cleanup costs. The role that cities play in the MSD process will also create opportunities for cities to improve their bargaining position in many property transactions and enhance economic development activities associated with previously contaminated properties.

5. State Property Tax Incentives for Brownfields Sites

The Texas Tax Code allows municipal or county taxing authorities to provide property tax relief for the development or redevelopment of certain brownfields properties that are located within a reinvestment zone and have been cleaned up through the VCP.

To be eligible, the real property must be located in a reinvestment zone created under the Texas Tax Code; not be in an improvement project financed by tax increment bonds; have received a Voluntary Cleanup Certificate of Completion from the TCEQ; and have had the value adversely affected by the release of a hazardous substance or contaminants according to the two preceding appraisals by the appraisal office.

To get tax relief, the owner of the brownfield property must enter into a tax abatement agreement with the taxing authority. The taxing authority can exempt from taxation the following:

- not more than 100 percent of the value of the property in the first year covered by the agreement;
- not more than 75 percent of the value of the property in the second year covered by the agreement;

- not more than 50 percent of the value of the property in the third year covered by the agreement; and
- not more than 25 percent of the value of the property in the fourth year covered by the agreement.³⁸

IV. Overcoming the Barriers to Brownfields Redevelopment—Funding for Brownfields Sites

Another way to overcoming the barriers to redevelopment of brownfields is to understand and ultimately acquire proper funding. Several funding mechanisms can be used to help redevelop brownfields sites. Some of the more commonly used mechanisms are detailed below. This is by no means a comprehensive list of available funding as there are numerous sources of funds available that may or may not specifically be dedicated for use at brownfields sites, but may provide a good means of additional funding. As noted in EPA's 2005 Brownfields Federal Program Guide,³⁹ "when looking for resources, the best path to success is one in which the project at hand is described in reference to the funding organization. For example, if Anytown, USA has a brownfields property that is between a bus station and a park, when seeking assistance from the Department of Transportation or the National Park Service, describe the property in terms of transportation needs and park—not merely in terms of brownfields because the staff members at those agencies reading the application may not know anything about brownfields."

A. EPA

The EPA funds discussed below are offered to "eligible entities." Eligible entities include the state, local governments, and redevelopment agencies amongst other entities. Private parties are not (directly) eligible for these grants, meaning that they cannot be the applicant. As a

³⁸ See Texas Tax Code, Title 3.

³⁹ This document can be found on the web at http://www.epa.gov/swerosps/bf/partners/2005_fpg.pdf.

result, a local government, as the "eligible entity," can play a key role in the redevelopment of properties within its jurisdiction.

1. Targeted Brownfield Assessment ("TBA") Grants

EPA's TBA program⁴⁰ is offered to eligible entities which include governmental entities, states tribes, local governments, councils of governments, and chartered redevelopment agencies to address brownfields sites.⁴¹ A Targeted Brownfields Assessment may be used for assessment and the establishment of cleanup options and cost estimates based on future uses and redevelopment plans.

The TBA program is managed through the EPA Regional offices and they have discretion in selecting areas to target for site assessment assistance. As a general matter, the Regional offices select sites that are abandoned or publicly owned; have low to moderate contamination; include issues of environmental justice; suffer from the stigma of liability; or have a prospective purchaser willing to buy and pay for the cleanup of the property, if needed.

TBA's are conducted by environmental consultants already under contract with EPA. The value of these grants is usually \$50,000.

2. Brownfield Assessment, Revolving loan Fund, Cleanup Grants

The Brownfield Revitalization and Environmental Restoration Act authorizes \$200 million per year through fiscal year 2006⁴² for grants to eligible entities. This money is to be used for (1) assessment grants; (2) Revolving Loan Fund Grants; and (3) Cleanup Grants.

Assessment grants must be used by the eligible entity (which includes the state, local governments, and redevelopment agencies among others) to inventory, characterize, assess, and conduct planning and community involvement related to brownfield sites. These grants may be awarded up to \$200,000 per site, but EPA has discretion to increase this amount to \$350,000 under certain circumstances.⁴³

Revolving Loan Fund Grants provide funding for a grant recipient to capitalize a revolving loan fund and to provide subgrants to others to carry out cleanup activities at brownfields sites. Thus, funding under this grant is available to not only the statutory eligible entities, but also to private entities by providing subgrants. Funding up to \$1 million is available per applicant.

Cleanup Grants are direct grants for the cleanup of brownfields sites. These grants are available for up to \$200,000 per site. Cleanup grants require a 20 percent match (although this may be waived upon a showing of hardship). The eligible entity applying for this type of grant must own the site for which it is requesting funding at time of application or demonstrate the ability to acquire title.

These grants are competitive and are awarded after a comprehensive review of the proposals by the EPA.⁴⁴ Proposals are judged on factors

⁴⁰ 42 U.S.C. 9604(k)(2)(A)(ii).

⁴¹ See 42 U.S.C. 9604(k)(1).

⁴² 42 U.S.C. 9604(k)(12).

⁴³ EPA also provides assessment grants to states, to be administered by the environmental agency of that state. Approximately \$350,000 in federal funds was made available to the TCEQ in fiscal year 2005, for conducting Brownfields Site Assessments (BSA). BSAs are essentially Phase I and Phase II Environmental Site Assessments. In addition to performing the site assessments, the TCEQ will provide regulatory guidance. This guidance includes developing cleanup levels, cleanup options, and clarification of environmental regulatory requirements as applicable. These grants usually do not exceed \$30,000 and generally include record reviews, site reconnaissance, interviews, and sampling performed under TCEQ contract.

⁴⁴ Proposals are usually due at the end of the calendar year for all three grants. The due date for grants to be awarded in 2004 was December 4, 2003. The due date for 2005 grants has not been determined yet.

that include the extent to which the money will be used to protect human health and the environment; spur redevelopment and create jobs; preserve open space and parks; represent a fair distribution between urban and rural areas; and involve the local community.

3. Clean Water State Revolving Loan Fund

The Clean Water Act authorizes EPA to provide grants to states in order to capitalize revolving loan funds for low-interest loan programs. The water quality improvement funds can be used by public entities to address all forms of water contamination from brownfields, including the excavation and disposal of underground storage tanks, excavation, removal, and disposal of contaminated soil, and Phase 1 and 2 assessments.

B. Department of Housing and Urban Development ("HUD")

1. Community Development Block Grant ("CDBG")

The CDBG program provides annual formula grant funds to metropolitan cities and urban counties, either directly or through the state, to carry out community and economic development activities that (1) benefit low and moderate income persons; (2) prevent or eliminate slums or blight; or (3) address conditions that present serious and immediate threats to the health and safety of a community. Brownfield redevelopment activities are eligible uses for this type of fund and can be used for economic development (loans to developers); acquisition of real property; and site improvement.

2. Section 108 Loan Guarantee Program

Section 108, the loan guarantee of the CDBG program, provides low interest loan guarantee

Prospective applicants should consult the EPA website to determine when proposals for 2005 grants are due.

authority. It allows local governments to transform a portion of their CDBG funds into federally guaranteed Section 108 loans large enough to pursue projects to renew entire neighborhoods—for economic development, housing rehabilitation, public facilities, and other eligible large scale physical redevelopment projects including brownfields redevelopment activities. The guaranteed amount must not exceed five times the amount of the most recent CDBG allocation. The maximum loan term is 20 years. Local governments must pledge their future years' CDBG allocation as security for the Section 108 loans guaranteed by HUD. The Section 108 program, however, does not require CDBG funds to be escrowed for loan repayment. Therefore, a local government can continue to spend its existing allocation for other CDBG purposes, unless it is needed for loan repayment.

3. Brownfield Economic Development Initiative ("BEDI")

Enacted in 1998, the Brownfields Economic Development Initiative has an annual budget of \$25 million for competitive awards for economic development grant assistance to public entities for use in redeveloping brownfields. These funds are often paired with a Section 108 guaranteed loan. The BEDI grants can be used to pay the predevelopment costs of a Section 108-funded project, as a loan loss reserve (in lieu of CDBG funds), to write-down interest rates, or to establish a debt service reserve. Eligible applicants are units of general local government. Non-entitlement communities are eligible to apply for a BEDI award but need their state to pledge some HUD CDBG funds as collateral for the Section 108 loan guarantee.

A public entity:

- may borrow up to five times its most recent annual HUD CDBG allocation;
- pledges CDBG funds as partial security for the loan guarantee for debt service if needed; and
- obtains the rest of the collateral usually out of security from the project that is assisted with the Section 108 funds (e.g.

real property; liens on machinery and equipment; accounts receivable inventory; pledges of tax revenues from local governments; full faith and credit pledges from local governments; loan portfolios and continuing cash flow from portfolios (of local governments)).

The minimum leveraging ratio is one private dollar for each public dollar spent. Usually, however, each public dollar is expected to leverage more than one private dollar. The BEDI funds are used to motivate local governments and private-sector parties to begin or continue redevelopment efforts on brownfields where contamination is known or suspected and redevelopment plans exist. HUD does not encourage applications when the scope is limited only to land banking. HUD wants the BEDI and Section 108 funds to finance projects that provide short-term results and demonstrable economic benefits—such as job creation and increased local tax base.

Finance is available for projects that include:

- Land Write-downs—Local governments may use Section 108 and BEDI funds to acquire a brownfields and re-convey it to a private developer at a discount to create an asset of enhanced value that can be used as collateral for other sources of funding to finance environmental remediation or other development costs. The idea is that the level of the BEDI assistance approximates the difference between the original cost of the site plus remediation, compared to the market value of the remediated property.
- Site Remediation Costs—Local governments may use the BEDI funds for site remediation costs. If the local government used Section 108 funds to acquire real property, the BEDI funds could be used to address assessment and site remediation costs as part of demolition, clearance, or site preparation activities. If the local government used Section 108 funds to

make a loan to a developer, the BEDI funds could be granted to the developer for remediation costs as part of an economic development activity.

4. Empowerment Zone/Enterprise Community Social Service Block Grant Initiative

Under this program, targeted communities apply to and are designated as an Empowerment Zone or Enterprise Community by HUD. Many Empowerment Zones and Enterprise Communities identified brownfields redevelopment as a critical element in their local economic revitalization strategy. Empowerment Zones and Enterprise Communities offer significant economic incentives to private companies and individuals for use in brownfields cleanup and redevelopment. These incentives include:

- HUD Economic Development Initiative funds;
- HUD Section 108 loan guarantees;
- Health and Human Services Social Service Block Grants;
- the Brownfields Tax Incentive;
- Tax-exempt bond financing;
- Section 179 Expensing;
- the Work Opportunity Tax Credit; and
- the Welfare-to-Work Tax Credit.

As noted above, this is not an exhaustive list of grant/loan programs available to fund brownfields projects. Among other federal agencies, the US Department of Commerce, Economic Development Administration ("EDA") has several grants that may also be considered for funding a brownfields project. These grants include: (1) Public Works and Development Facilities Grant Program (2) Planning Program Grants; and (3) Local Technical Assistance Program.

V. **The Role of the Municipality or Local Government in Brownfields Redevelopment**

Local governments are an essential part of the redevelopment process. Unlike a private business, local governments are responsible for promoting the health and well being of their communities, and they can play a key role in redevelopment projects that the private sector would not undertake on its own. In many cases, public programs and funds must be accessed by government entities. Local governments are also best positioned to identify those properties whose redevelopment would result in the greatest benefit to their communities.

By undertaking certain pre-development steps, managing liability and taking advantage of public funds and programs, redevelopment of brownfields can become manageable. Of course, the long-term benefits will be greater as well, in that land values will be enhanced, blight will be eliminated, and numerous other potential values, such as increased taxes and job creation will be realized. This section discusses the steps that municipalities and local governments should consider undertaking in an effort to better position themselves for the opportunities

Phase I: Inventory and Prioritize

The initial steps for brownfields redevelopment include the following: (1) develop a property inventory; and (2) set criteria and prioritize properties within the inventory.

- **Developing an Inventory**

Developing an inventory of brownfields is the first and most important step of the process. Developing an inventory should be done using as many sources as possible, which could include consulting institutional and government sources, reviewing governmental files (from the city and/or county's tax delinquent property lists, if available, to review of TCEQ and/or EPA databases), obtaining information from financial institutions, public meetings, as well as using the most basic tool—simply identifying such sites through mere observation of the property. The

type of information that needs to be gathered for each identified property includes: site acreage and location; ownership status; amount of back taxes owed, if any; and zoning designation.

- **Prioritizing Properties**

Once brownfields are identified, the issue becomes whether they can be redeveloped. Establishing the criteria to use in prioritizing the properties is the next step. The issues that must be considered at this stage are generally the following:

1. **Obtaining site control.** Issues such as the ease of obtaining site control, and the obstacles for obtaining control are considerations.
2. **Liability assessment.** What is known about the type and extent of contamination? How much effort is needed to find out? Who is liable? Can the liability be quantified? Is the site eligible for VCP? IOP?
3. **Managing the Costs.** Determine potential funding sources. Determine if property is located in an empowerment zone, a Tax Increment Financing (TIF) District. If no, determine whether creating a TIF district is possible. Determine whether tax benefits to current or potential owner are possible.
4. **Community Support.** Is there support for redevelopment from the community as well as community leaders.

These criteria will assist in identifying sites for development, based on the particular priorities of the local government. For example, a site may be a high priority for redevelopment because it is significantly impacting the neighborhood, on the other hand a site may be a high priority because it is considered to be a "low hanging fruit" because it does not need extensive site preparation or is not highly contaminated.

Phase II: Site Selection and Overcoming Barriers

Once properties have been prioritized, the field needs to be narrowed to a selected few for additional consideration. Once the field has been narrowed, the local government needs to consider the following for the priority sites: (1) Identify funding resources; (2) Identify and attempt to eliminate the pre-development barriers; (3) Determine how risks and liability can be managed.

The most common barriers to brownfields redevelopment are environmental conditions at the site, liability issues associated with the environmental conditions, public involvement, and site control. The local government is well positioned to address many of these barriers, and therefore has the ability to reduce the risks and the costs to the private sector thereby increasing the prospects for redevelopment.

Environmental Conditions

Understanding the environmental conditions of a property reduces, to a certain extent, one real barrier to redevelopment, as speculation about contamination levels at a brownfields site often leads to stigmatization of the property. Gaining knowledge of the environmental conditions may involve conducting environmental site assessments. If such assessments have been performed in the past, either supplementing the assessment or reviewing and summarizing the information may be the appropriate step. There are state and federal funds available for these assessments as discussed in Section IV. As noted in that section, local governments are often the eligible entity as applicants for these grant funds to perform the site assessments.

Liability

The liability issue is directly related to the environmental conditions at the site.

If the owner of the property has been identified, the local government must work with the owner to encourage development. Reducing liability concerns through the various mechanisms

discussed above (i.e. tax incentives, using funds to remediate, use of liability relief mechanisms, and use of MSD) are tools that may be available to the City that may entice the owner to work towards addressing the environmental issues. The local government may also undertake the task of identifying interested developers for the property. If an interested developer is identified, the local government should serve as the link between the state's VCP and the developer, act as a liaison between the developer and community, as well as provide incentives such as funding through grants, offering financial incentives, and use of MSDs, among others. On the other hand, if a developer is not readily available, the development of a marketing strategy that includes the incentives noted above is the next task. Often considered as a last resort (although depending on the facts of a case, this does not necessarily have to be the case), the local government should consider whether it can redevelop the property on its own.

If the owner of the property has not been identified, the first step for the local government is to determine whether the property is tax delinquent. If so, repossession of the property may be an option, in which case the local government may become the new owner or may sell the property to a third party. Once a new owner has been identified, the analysis follows the path discussed above.

The reduction or minimization of the barriers through the efforts of the local government ultimately reduce the risks associated with brownfields sites, thus making these properties more attractive to prospective purchasers. Studies have shown that the reduction of the upfront costs lowers the possibility of such site becoming permanent abandoned properties—this is especially true when the site is marketable, which through the prioritization stage, this is an area in which the local government can play a key role.

In certain cases, it may even make sense for the local government to absorb some of the risks that the private sector would otherwise have to assume. This is a risk-based analysis that involves a determination of the amount of risk

versus the benefits that can be realized after redevelopment.

VI. CONCLUSION

Brownfields are abandoned or underused properties that have been contaminated from past commercial or industrial uses. Brownfields are affected primarily by the liability framework set up by CERCLA and its state counterparts.

Liability is strict, joint and several, and retroactive. That means that the EPA or TCEQ can sue one of several contributors to pollution, can sue for pollution that occurred before environmental regulations were in place, and does not need to prove negligence in order to hold a party responsible. The impact of all this on economic development has been significant.

The point at which environmental liability becomes the deciding factor in a decision not to foreclose, sell, or develop a property is unclear, but much of the brownfields debate has focused on relieving the liability pressure, and providing financial incentives to get potentially contaminated properties back on the market, and therefore increasing the likelihood of cleaned up. Specifically, the initiatives that encourage such redevelopment include re-defining legal liabilities (eliminating some potential lawsuits), providing mechanisms for reduction in cost for environmental investigation and remediation, extending financial protections to lenders involved with brownfields redevelopment, offering grants, low interest loans and tax incentives for clean-up of contaminated sites.

When local governments are knowledgeable about and use the available legal tools, and have an understanding of the available resources, they can play an essential role in the redevelopment process. Redeveloped brownfields sites attract new business, create jobs, improve the neighborhood, and increase the local tax base

Municipal and local governments can and should take a proactive role in redeveloping brownfields properties. They can match potential businesses and developers with reuse sites. They can coordinate funding (and in some cases, as described above, they are the only eligible entity for funding), assume some

financial responsibility for site remediation costs, offer incentives, and serve as links between private developers and state/federal environmental regulatory agencies. Under certain circumstances, it may even be advantageous for municipalities or local governments to publicly acquire brownfields properties and handle the redevelopment on their own. It is difficult to

It is without doubt that playing a role in the brownfields redevelopment process can be advantageous to local governments. Local governments must choose the appropriate role—whether it should act as a broker, as a partner in the development, or whether it should act on its own. The ultimate decision on what role the local government wants to play in this process depends on factors that are unique to the local government, but can only come after identifying the site(s) that could benefit the local governmental, and having knowledge of the available tools that can facilitate its development. Neither task is easy, but the possibility of finding gold in the brownfield may just make it worthwhile.