

Commentary

Brownfields Planning and Process: A Multidisciplinary Primer

Chuck Wolfe and Lindsay Delecki

MAYOR: "George, this is the Mayor. I just returned from the Brownfields Conference in St. Louis and went to several sessions on how to redevelop contaminated property with all of the new legal and insurance tools. I think we need to step up and enact plan and regulatory amendments to finally get the National Cyanide property back to the market as a public-private partnership that will develop a live-work community in a way that avoids liability for the city. Please be prepared to comprehensively address this at the next council meeting, and you might give some potential redevelopers a call and talk about appraisals and how to pay for cleanup. But it looks pretty straightforward to me!"

GEORGE (Planning and Community Development Director): "AAAARRRRRRGGGGHHHH!"

Whether working as a public sector local planner, a community or economic development specialist, or a private sector planning consultant, more and more professional planners are taking on brownfields redevelopment, often with only a rudimentary understanding of the legal tools, practical financial risks, and valuation issues associated with redeveloping contaminated properties. Yet the eclectic and ecumenical nature of planning is ideally suited to the multidisciplinary, team, and consensus-building effort that accompanies such projects. This article provides a basic overview of brownfields issues, process, and associated legal and financial risk. It suggests opportunities for public and private sector planners to assume a more comprehensive role in site-specific brownfields

planning and redevelopment. And it seeks to enhance their understanding of the importance of, and issues involved in, valuing brownfields.

REGULATION OF BROWNFIELD DEVELOPMENT

Modern Growth Management Laws Encourage Use of Previously Developed Properties

The recent proliferation of more complex growth management and planning legislation has provided a compatible framework for the brownfields movement. For instance, Washington's Growth Management Act targets growth in certain areas, particularly urban growth areas and specified and concentrated master planned rural areas.¹ The act as implemented, and growth man-

agement generally, encourages reuse of previously developed properties, including industrial areas, and a careful distinction between urban growth areas and designated critical areas and natural resource lands.

Environmental Laws May Create Disincentives to Reusing Industrial Property

Modern land use laws seek to encourage infill redevelopment and growth in urban growth areas (specifically within targeted urban growth boundaries) to protect critical areas and natural resource lands and discourage sprawl. But a potential drawback to reusing previously developed industrial and other properties within urban growth areas is potential and actual contamination.

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1. See WASH. REV. CODE ch. 36.70A.

In states such as Washington, recent legislative amendments and rulemaking have also enhanced opportunities for successful brownfields projects.

Contamination is often a difficult issue to resolve in the purchase, development, or financing of property. Under traditional federal and state environmental laws, the current owner of a property may be held strictly, jointly, and severally liable for all costs to clean up contamination on the property. Despite recent liability protections such as the definition of “bonafide prospective purchasers” under 2002 amendments to the federal Comprehensive Environmental Response, Claims, and Liability Act (CERCLA), associated rulemaking, and state legislative analogues, investigating a property for contamination can be time-consuming, expensive, and inexact.

In the real estate market, buyers were historically reluctant to assume the risk of contamination on a property without conducting some investigation. Attempts to define the extent of contamination and estimate the cleanup costs can be uncertain and very expensive, and can often exceed the value of the property. Faced with these sorts of potential cleanup costs, the specter of environmental stigma, and potential strict liability under environmental laws, prospective property owners were often unwilling to purchase a contaminated property. For these same reasons, lenders were often unwilling to assume the risk of financing a contaminated property.

A “brownfield” is an area historically associated with uses that might create contamination. Developers and other property users are legitimately concerned about such properties because of the potential for unlimited liability, financial risk, and environmental stigma. In contrast to brownfields, “greenfields” are undeveloped suburban or rural outlying areas, which are attractive properties to develop from an environmental perspective because of the low likelihood of contamination and environmental liabilities.

As growth management and other land use tools seek to discourage sprawl and encourage redevelopment and reuse of

urban and industrial areas, the brownfields movement has emerged. It seeks to engage federal, state, and local governments in efforts to moderate concerns about, and popularize a range of solutions for, the liability, financial risks, and environmental stigma associated with redeveloping and reusing these areas.

Planners involved in the brownfields process will often find site-specific implementation at the crossroads of conflicting ideals. They will be called on to help resolve the frustration of developers, who may be excited to abandon the sprawl-inducing “greenfield” tradition, only to be faced with the challenge of cost and risk control resulting from the uncertainties of cleanup and future property value.

Accomplishing Brownfield Redevelopment Through Regulatory Reform

In recent years, a number of factors have combined to improve the regulatory and business climate for successful redevelopment of contaminated properties and the predictability needed to help offset legal and financial risk. Although it began as a strict, joint, and several liability, the “polluter must pay” scheme of government enforcement has evolved towards a consensus-based focus on how best to facilitate a preselected future land use on a selected brownfield property. As the pressure to reuse properties within urban growth boundaries has increased, individuals and entities with substantial economic resources have become interested in successful transformation of brownfields and the benefits offered by increasingly flexible approaches to liability avoidance. Simultaneously, the availability of grant money at the federal and state level has increased local government willingness to undertake remediation of contaminated properties to create jobs and other local economic benefits.

In states such as Washington, recent legislative amendments and rulemaking

have also enhanced opportunities for successful brownfields projects by streamlining regulatory processes, eliminating redundant levels of permitting, providing advance resolution of liability, and pre-approving environmental cleanup that occurs as part of the development process.

In 1995, the Growth Management Act, the State Environmental Policy Act (SEPA)², and the Shoreline Management Act³ were amended to better integrate long-range planning and site-specific environmental review, and to explicitly allow development agreements as a tool for assuring long-term project phasing, which can allow for the complex mix of cleanup and development planning and approval presented by brownfield projects. The same legislation also created the basis for permit coordination among all agencies with jurisdiction over a given site.

In addition, Washington’s cleanup law, the Model Toxics Control Act (MTCA),⁴ was amended in 1994 to allow preemption of certain agency and local government permits that would be otherwise required for cleanup activities, thereby eliminating time consuming multiple layers of approval for development projects that contain cleanup components. Finally, amendments to SEPA regulations allowed for a flexible approach to integration of review of a cleanup action under MTCA, combining what would previously been two sets of environmental review for cleanup and development components.

The 1994 amendments to MTCA also enabled prospective purchaser agreements, which have become an often cited component of successful brownfield redevelopment in Washington and other states. Prospective purchaser agreements were first pioneered at the federal level in the late 1980s. They allow a purchaser of contaminated property to prenegotiate cleanup obligations and largely eliminate environmental liability if the terms of the agreement are complied with. Such

2. WASH. REV. CODE ch. 43.21C.

3. WASH. REV. CODE ch. 90.58.

4. WASH. REV. CODE ch. 70.105D.

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agreements require a showing that the property will be cleaned up rapidly, using more significant financial resources than usual. They formerly required a showing of a substantial “public benefit.” The 1997 MTCA amendments relaxed the “public benefit” qualifying standard and clarified the assignability to future owners of the associated court-approved consent decree device, which assures that environmental liability protections will carry forward upon sale of the property. Prospective purchaser agreements have been successfully implemented for special projects in the Puget Sound area, often in a residential context, unforeseen just a decade ago.

In MTCA rulemaking finalized in August 2001, Washington increased the focus on future land use as a driver of remediation scope. As have many states, Washington also enhanced the role of site-specific risk assessment, ensuring that sites are treated flexibly and that overly restrictive “one size fits all” cleanup approaches are avoided. Similarly, the state’s Voluntary Cleanup Program continues to provide smaller-scale developments and sites with less serious contamination issues the benefit of “no further action” letters, as well as technical consultation and opinion letters that, while not full-fledged legal settlements, provide developers and lenders assurance that planned cleanup and redevelopment approaches protect human health and the environment appropriately.

BROWNFIELD DEVELOPMENT AND THE PLANNER

The major impediments to successful brownfields redevelopment—and therefore of the perceived value of such properties—regularly greet the practicing planner who serves as a governmental contact or a member of the consultant team for both sophisticated and unsophisticated stakeholders. While the regulatory process has grown increasingly flexible, the traditional rede-

velopment disincentives have moderated but still remain: joint and several liability, lender reluctance based on uncertainty and impaired collateral, the time and complexity of environmental and land use approval processes, and delayed return on initial investment. While some opportunities will still prove too complex, risky, and costly to pursue, the planner can play an innovative role on the development team advising on interdisciplinary components of risk and value and avoiding traditional black and white approaches to environmental liability. The planner can work with the developer, environmental consultant, lawyer, architect, and appraiser to recast traditional liability avoidance by integrating remediation and development to implement an ideal brownfields planning process.

The American Society of Testing and Materials (ASTM) has developed a consensus-based “Standard Guide for Process of Sustainable Brownfields Redevelopment” (E 1984-03).⁵ The ASTM process establishes a four-stage evolution involving initiation, evaluation, transaction, and implementation, as well as identification of key stakeholders. Key emphasis is placed on modeling the property life cycle and risk to assess the viability of development, permit streamlining, public participation, and the key roles of government officials such as planners. This article reflects the ASTM approach and is complementary to the ASTM guide in the integrated planning discussed below.

The Planner Can Send the Integration Message

In this context, the planner can contribute to the value of a brownfield property by participating in the integration opportunity best described by John Ryan of The Retec Group in Seattle, who stresses how regulatory initiatives have resulted in a planning and business opportunity that can reduce both cleanup and redevelopment costs.⁶ A

brownfield project can offer certain advantages to both owners and prospective purchasers or developers. Of particular importance is how brownfield projects can combine features of what were once separate cleanup and development processes into an integrated and more efficient whole. The integration opportunity urges unity of cleanup and development design and programming from the inception of the project, stressing future land use, double duty development features, and sound financial planning and appraisal practices:

1. Obtaining more favorable cleanup standards that are consistent with future land use.
2. Reducing long-term care requirements by placing the property into productive use.
3. Obtaining double duty for cleanup and redevelopment costs (“twofers” such as remediation cap and building foundation).
4. Overcoming regulatory inertia by obtaining local support for job creation and increasing the tax base.
5. Recovering the asset value of the property in the marketplace.
6. Addressing liability concerns.

To obtain these advantages, it is important to integrate remediation and development processes at or before the feasibility study stage of a project. Historically, most redevelopment projects did not begin without some form of final agency cleanup certification that adequately addressed liability issues. By moving the redevelopment focus (including future land use determinations) to the feasibility study stage of remediation, both seller and buyer are better able to take advantage of brownfield approaches.

5. ASTM E 1984-03, “Standard Guide for Process of Sustainable Brownfields Redevelopment” (ASTM International), available at www.astm.com. See also *Redevelopment Process* at [\[development/redevprocess.shtml\]\(http://www.envirottools.org/redevelopment/redevprocess.shtml\).
6. Information in this and the next section is derived from numerous presentations and Retec newsletter articles by John Ryan over the last two decades, as well as author](http://www.envirottools.org/rede-</p></div><div data-bbox=)

Chuck Wolfe’s work with Ryan. See also *Brownfields: Greater Incentives for Site Restoration* at <http://www.retec.com/brownfields.pdf>.

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The Planner as Integration Issue-Spotter

As Ryan has indicated, several critical issues must be resolved as the remediation and development processes are integrated. These include the following:

1. Complete a **site characterization** to properly allocate liability and determine the likely residual contamination after cleanup and redevelopment is complete.
2. Prepare a preliminary **site development plan** to define future site use and potential pathways of concern.
3. Prepare a **risk-based corrective action plan**, with the goal of satisfying regulatory agencies, eliminating pathways of concern for future development, and removing significant sources of contamination.
4. Obtain **permits and approvals** for both the cleanup and redevelopment projects, taking advantage of permit exemptions and other opportunities for expedited and consolidated approvals under state cleanup laws and/or CERCLA.
5. Establish an agreed-upon **valuation of the property** based on the fair market value of the property, the cost of additional remediation, and the residual risk or stigma associated with residual contamination.
6. Develop a **financial plan** identifying potential financing and tax advantages for the proposed project.

The Planner's Dual Roles

The role of the planner can encompass a dual role as facilitator for the developer (i.e., a member of the development team) and agent for the community, with the goal of meeting the needs of both parties. As a member of the development team, the planner can contribute to the value of a brownfield property by smoothing the often complicated environmental and

land use approval process. As an agent for the community, the planner is a source of information regarding the brownfield property, as well as a point person to collect public comment. In some cases, the planner may organize and/or lead citizens groups to review and comment on the brownfield project, and act as a liaison to state and federal negotiators, who are ultimately responsible for adjudging the overall protectiveness of selected remedial approaches.

The Planner as a Team Member

To assume the innovative integrating role in a complex contaminated property transaction and development, the planner team must act as part of a multidisciplinary team. It is critical to work with an environmental consultant, lawyer, architect, appraiser, and others to identify the nature and extent of contamination, likely required cleanup scenarios, development potential, and market value. To aid in the creation of pro formas and other decision tools and analytical devices, it is often possible to quantify the risks created by contamination through indemnification and/or contribution agreements with caps or formula shares, reliable estimates of consultant and cleanup costs, and "cost cap" and/or "pollution legal liability" insurance. The appraiser can evaluate the impact of successful application of this effort on the market value of the property. Ultimately, the appraiser synthesizes all relevant information related to risk, including both market perceptions of risk and actual risk. The appraiser then uses this information to quantify risk and estimate value. This process can be complicated and require the assistance of an appraiser who specializes in valuing contaminated properties.

BROWNFIELD VALUATION

Amid the innovative regulatory change and development approaches discussed above, we have established the potential

multifaceted role of the planner as a member of the development team in advising the brownfield investor or developer regarding the value or perceived value of the chosen property.

Contaminated properties may present substantial redevelopment and renewal opportunities to cities and communities. However, developers may perceive them as great financial risks. The presence of contamination creates greater financial uncertainty, and the prospect of negative or severely compromised property value. To ensure a successful redevelopment, clean-up costs, including professional fees and insurance premiums, may require offset by reliable modeling of projected future income streams. Because of this speculative risk, the role of the appraiser in quantifying risk becomes critical. Thus, valuation methodology can be key in determining the feasibility and success of a brownfield project.

Valuation is not as straightforward as subtracting the costs of remediation from the value of the property as if it was never contaminated. In fact, the valuation of contaminated land "as is" (or subject to contamination) proves to be so complicated that few appraisers are competent to do it.

There are many methods of quantifying impaired, as well as unimpaired commercial property. Whichever method is employed, the appraiser must be careful to consider the contamination's impacts on both market perception and property income. (In circumstances when the property does not produce an income, the appraiser would need to quantify the lost utility of the property, otherwise known as the Highest and Best Use.)

Traditional valuation approaches (Cost Approach, Income Approach, and Sales Comparison Approach) provide a place for appraisers to start evaluating an impaired property. The Cost Approach estimates either the replacement or reproduction cost of the affected property. The Income Approach relates value

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to the market rent that the property can be expected to earn. The Sales Comparison Approach estimates value by comparing the property being appraised against properties that have recently sold in the area and are similar in size, age, construction, and amenities (known as comparable properties, or “comps”).

In valuing less common contamination cases, however, sufficient data may not be available to employ any of these traditional methods. In these cases, the appraiser may have to use alternative techniques or methods to identify the market effects of contamination on property values. Some of these accepted alternative techniques and methods are:

1. Survey Research
2. Case Studies
3. Literature review of contaminated property literature
4. Matched Pairs method
5. Monte Carlo
6. Use of Control Areas for unimpaired valuation
7. Hedonic Modeling
8. Depreciation Analysis⁷

PRACTICAL CONSIDERATIONS CONCERNING BROWNFIELD VALUATION

In helping the development team to establish the value and redevelopment potential of a contaminated property, the planner can identify certain practical considerations as a further basis for client advice.

Avoid Quick and Dirty Oversimplicity

Many assume that contaminated property is valued by determining its value in an uncontaminated condition, then subtracting the estimated or actual cost of remediation. While this cost can be related to market value, it is oversimplistic to assume this cost as the sole determinant

of market value. This straight subtraction approach ignores the facts that property can retain some market value even though contaminated, and that during and after remediation, market value can increase based on the restoration of a clean site and independent market forces.

Even Dirty Property Can Be Used and Traded

Clients faced with a purchase or investment decision about a contaminated property can often benefit from a simple reminder that property, even if unusable in its present condition, may have speculative or investment value based on future potential. In addition, in many situations, the cleanup obligation and associated agency scrutiny have not matured based on incomplete site characterization, low site rankings, or human health risks.

The trade in contaminated real estate is common, ranging from the corner gas station and strip shopping center to small and large industrial concerns. As indemnification clauses, insurance tools, and more flexible regulatory devices have helped balance risks until they pass muster, the market experience of increasingly sophisticated purchasers, investors, partners, and lenders have enhanced market experience and the ability to assign value to contaminated property.

The Enigma of Stigma

A property is stigmatized as undesirable when its environmental features are viewed as repellant, upsetting, or disruptive. This environmental stigma, referred to simply as stigma, reflects the general notion that market participants are often averse to locating adjacent to a contaminated property or on a previously contaminated property. Usually this aversion results from perceptions of uncertainty and risk, both perceived and actual.

No exact definition or application of stigma has emerged. However, one state has defined stigma as “[a] perception that

property value is negatively affected despite contamination clean-up.”⁸ Along these lines, stigma is detectable when contaminated properties sell for less than the difference between the value of the property uncontaminated and the cost to remediate the contamination.⁹

Stigma is not one size fits all. In fact, stigma has widely varying impacts on property values depending on numerous circumstances, making stigma difficult to quantify. Factors that impact the severity of stigma include media exposure, fear, disruption of normal property use, concealability, aesthetic effect, severity of the contamination, persistence of the contamination, and risk to health. Moreover, stigma tends to fade over time and eventually disappears as perceptions of risk decrease.

The difficult job of the appraiser is to quantify stigma, which can be a mere emotional apprehension or an authentic discount factor on property value. When valuing a contaminated property, stigma may be sufficiently accounted for in the three traditional approaches to valuation. In the Cost Approach, the appraiser deducts the remediation costs along with any negative affects (stigma) resulting from market perception. In the Income Approach, stigma is accounted for after considering income factors such as decreased rent, low occupancy, increased expenses, or adjusted capitalization and discount rates. When using the Sales Comparison Approach, stigma is included in the value estimate if the comparable properties all contain contamination with an associated stigma.

In addition to using the three traditional approaches to valuation, quantification of stigma may also require further study of market participants’ attitudes towards the contaminated property. Survey research is a widely used and accepted method for doing this. However, survey research works best as a supplement to other valuation methods. A 1999 survey of

7. See John A. Kilpatrick & Bill Mundy, *Appraisal of Contaminated Property in the United States*, J. JAPAN REAL EST. INST., October 2003, at 25, 31, available at www.mundyassoc.com/publications/appraisal_contaminated.pdf.

8. DIV. OF PROP. VALUATION & EQUALIZATION, ARIZ. DEP’T OF REVENUE, CONTAMINATED PROPERTY VALUATION GUIDELINE 2

(September 1, 1998), available at www.revenue.state.az.us/property/contam.pdf.

9. Kilpatrick & Mundy, *supra* note 7, at 26.

The planner can play a role in placing this driver and associated brownfield issues in context.

appraisers indicated that appraisers use as many methods of valuing stigma as possible, given the data available. The survey also found that the most commonly used method for quantifying stigma is market sales transactions data (83 percent). The next most commonly used methods are the use of the appraiser's experience (51 percent) and the opinions of buyers, sellers, and brokers and lenders (51 percent). Only 3 percent reported that they ignore stigma entirely.¹⁰

It is important that property owners and stakeholders do not accept stigma outright, but rather commission the aid of a qualified appraiser to measure the aversion to the property and help distinguish impairment of property value based on direct costs of remediation from impairment of property value based on stigma (often attributable to impaired mortgageability, aggravation costs, and fear of the unknown).

CONCLUSION: THE NATURE AND EXTENT OF CONTAMINATION

In the final analysis, the nature and extent of the contamination on a site drives numerous factors that affect the property's value and potential for redevelopment, including:

- Extent of liability for future owners and operators and applicability of newer liability-limiting regulatory tools.
- Degree of complexity of agency negotiations to determine appropriate remedies.
- Likely restrictions on land use (deed restrictions/institutional controls) during and after cleanup.
- Extent of marketplace knowledge about the parcel and associated stigma.
- Portion of eventual revenue stream that must be spent on the cleanup and later monitoring.

As a part of a multidisciplinary team, the planner can play a role in placing this driver and associated brownfield issues in context, allowing the integration of site assessment, property valuation, risk assessment, future land use planning, development design, and cleanup into a "whole" and efficient brownfields development process that can realize the full potential of brownfield sites to the benefit of developers, investors, and the community.

10. William N. Kinnard & Elaine M. Worzala, *How North American Appraisers Value Contaminated Property and Associated Stigma*, APPRAISAL J., July 1999, at 269.