



Bringing Corporate Brownfield Properties to Market

*Prepared by
The National Brownfield Association*

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The Issue

Brownfield News estimates that up to 50% of the \$1–2 trillion worth of commercial properties held by corporate America may be devalued due to environmental impacts. A significant portion of these properties represent non-strategic, surplus assets with good development potential. According to owners, these corporate properties are not coming to market for the following reasons:

- Actual and perceived lack of regulatory certainty and finality regarding end points for environmental cleanup;¹
- Risk of exposure to third-party lawsuits and toxic tort actions;
- Discomfort with current liability release mechanisms and reopeners or comeback sites;
- The challenge of estimating environmental liability costs and costs associated with environmental cleanup;
- Fear on the part of the owner that presale due diligence will create potential regulatory action;
- Existing zoning or local ordinances governing the use of a property that are outdated or inconsistent with a new highest and best use; and
- Lack of awareness of evolving risk management tools and changing market conditions.

This policy document identifies ideas and incentives to increase the market supply of corporate brownfield properties. These concepts may be useful to corporate property owners, local officials and others trying to encourage redevelopment. This paper does not address issues related to environmental enforcement, compliance monitoring, financial disclosure and other regulatory enforcement mechanisms.

The redevelopment of environmentally impaired properties — brownfields — has both a real estate and an environmental component and requires specific expertise. Many municipalities, through the leadership of forward-thinking mayors and other stakeholders, understand the importance of revitalizing blighted areas within their communities. Recently, corporate property owners have begun to see that redevelopment of these properties is feasible and can result in material corporate benefits (e.g., increased corporate profits and shareholder value for publicly traded companies). Responsible management and divestiture of brownfield properties can also clear the balance sheet of environmental and other financial liabilities (including ongoing maintenance costs) and foster good public relations in the community.

However, property owners need comfort that they can bring finality to their environmental liabilities (once they have ensured compliance with regulatory cleanup standards) before they will transfer properties. They also need to have predictable, consistent and stable environmental public policies that allow parties in the transaction to determine and allocate costs and risks with reasonable certainty. Perceptions and market conditions are changing, and transfers are occurring using a combination of state Voluntary Cleanup Programs (VCPs), comfort letters, environmental insurance, and the allocation of responsibilities and liabilities through purchase and sale agreements. By communicating these practices through outreach and training programs to owners and others involved in such transactions, more of the vast reserves of corporate brownfield properties will come to market and more properties will be cleaned up and redeveloped, thereby reducing environmental risk and creating significant economic development opportunities, especially in America's core cities.

¹The terms “finality” and “long-term release” are not synonyms, nor do they necessarily have the same meaning for owners, developers, insurance companies and regulators.

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Changing Perspectives

All stakeholders, not just those legally responsible for the contamination, must contribute to the redevelopment solution for brownfield redevelopment to move forward. In practice, the “polluter pays” mind-set is shifting to “polluter cleans up, but all stakeholders should participate in redevelopment.” This subtle, but important, shift in redevelopment is not intended to eliminate the original CERCLA-based “polluter pays” liability scheme, but rather to shift the redevelopment cost burden away from a sole responsible entity to a “partnership” with those who stand to benefit from the redevelopment. Further, this view recognizes that cleanup costs are just one of the many significant costs necessary to successfully redevelop brownfield sites.

Brownfield redevelopment is still largely dependent upon market demand. However, corporations and businesses are beginning to recognize the growing array of regulatory and financial programs and tools that are available to pursue brownfield redevelopment. Developers are starting to learn to remediate as quickly as possible to maximize value. This trend may provide encouragement for some owners to consider selling properties for redevelopment. Faster remediation does not necessarily mean lower clean-up standards. Rather, redevelopment rewards faster, better cleanup by maximizing the return for the investor. Faster redevelopment can be achieved through the application of additional resources, the opportunity for synergy between remediation and redevelopment, and the benefit of a new owner and the bank behind it that has made a substantial investment.²

A pragmatic shift has occurred in how to deal with the redevelopment of properties, which are not listed as major priorities for state or federal cleanup (i.e. National Priorities List/NPL sites). States have understood and reacted to the need to resolve issues obstructing the economic revitalization of

their communities. Nearly all states have responded by creating Voluntary Cleanup Programs (VCPs) that establish relatively streamlined, risk-based processes by which a property can be investigated, remediated to levels protective of human health and the environment (for current and reasonably anticipated future uses) and placed back into the property redevelopment chain.³

The VCP process has brought needed relief for redevelopment initiatives at the state level. The Small Business Liability Relief and Brownfields Revitalization Act (2002) clarified the respective roles of state and federal regulations, recognizing states and tribes as the primary regulators of brownfield cleanups. The law further supports state and tribal response programs by authorizing \$50 million per year to establish and enhance these programs. The brownfield legislation also reinforces state regulatory authority over brownfields by barring federal Superfund enforcement action at brownfields enrolled in state response programs.

Within its new statutory context, the USEPA has sought to assuage concern that the federal government may step in to require further cleanup, however, brownfield owners remain apprehensive about potential federal liability. The insurance industry has sought to address lingering liability concerns through the creation of a number of environmental insurance products that can be tailored to meet the needs of a specific site. While as many ways to achieve the mutual goals of buyers and sellers are available as there are individual transactions, almost everyone can agree on this point: Successful brownfield redevelopment places a premium on the creative application of many disciplines, including legal, financial, environmental, political and insurance capabilities.

²Developers may be more likely to spend additional funds on remediation as investments, as they are seeking their return from development of the property. This can result in a quicker, and in some cases, more complete remediation (i.e., A developer spent \$30,000 extra to get a parcel to “non-detect” levels of containment because it knew that it would then be far more valuable and attractive to a fast food buyer).

³This measure of “finality” is typically in the form of a Comfort Letter/No Further Action letter, No Further Remediation letter, and/or a Covenant Not to Sue, which is provided in writing, recorded within the state’s program and, in some cases, recorded on the property deed.

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Ideas for Moving Forward

1. Improving Regulatory Certainty

The National Brownfield Association proposes the following major concepts to promote responsible redevelopment of contaminated properties and the expansion of the brownfield market.

Improving Regulatory Certainty

2. Managing Corporate Liability

Property owners/sellers want regulatory certainty that their voluntary site cleanup, once it meets state/federal standards, will release them from further liability. Suggestions for improving regulatory certainty include:

3. Incentives

Adequate Resources – Both staff and financial resources should be available for state brownfield programs. Effective state cleanup programs should be adequately staffed so that they can provide parties engaged in brownfield cleanups covenants not to sue, no further action letters and other regulatory closure techniques in a timely manner. Coupled with the bar on federal enforcement and the new CERCLA liability protections, this approach should provide owners and buyers with a path to resolving future liability with both state and federal regulators in return for ensuring timely approval of cleanup plans and long-term protective cleanups.

4. Education and Outreach

Liability Release – A specific and definable liability release for the potentially responsible parties should be evaluated when both buyer and seller have met the remedial objectives for the property. The federal brownfields law that reinforces state regulatory authority over brownfields by barring federal Superfund enforcement action for most sites once cleaned up under VCPs needs to be more widely understood and the approach expanded to other federal programs (e.g., TSCA, RCRA).

Institutional Controls – States need to make implementation of effective and enforceable institutional controls a top priority. Additional mechanisms are required to verify and protect land use covenants that run with the property. There are cases where land use restrictions or covenants have not been appropriately recorded on the deed and other cases where ownership transfers have occurred without notification of restrictions to the new owners. In other cases, land use restrictions (e.g., institutional controls) have simply not been enforced.⁴

This needs to change in order to promote the certainty and finality necessary for brownfield redevelopment. One manner in which this might be done is through adoption by states of the new Uniform Environmental Covenants Act (UECA). The UECA puts forth a model law in an effort to provide a statutory vehicle for implementing and enforcing institutional controls that can be adopted to provide some uniformity among the states.

⁴For example, Massachusetts typically does not issue such documents demonstrating finality. For non-Activity and Use Limitation (AUL) sites, there might be an argument for the state to issue some closure certificate with a specified time frame – two years or so. For sites with AUL, provide funding to audit in a timely manner and allow closeout.

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Managing Corporate Liability

Corporate inability to manage liabilities once a property has been divested can be addressed by bringing more clarity and certainty to the transaction process. Several key elements factor into managing corporate liability when marketing properties for brownfield redevelopment. They include:

- Understanding the best use for the property
- Accurately estimating the actual liability and or remediation costs;
- Assembling an appropriate project team to integrate remediation and redevelopment; and
- Applying appropriate tools to manage risk.

End Use – Understanding appropriate end uses for a brownfield property is a valuable tool in controlling liabilities. Considering what end use options are available will limit potential developments that conflict with engineered barriers, institutional controls and existing zoning requirements. Bundling highly marketable properties and adjacent, more marginal properties can enhance area redevelopment and generate project momentum. Moreover, bundling properties for purposes of regulatory oversight and approval should expedite transactions.

Understanding Environmental Liabilities – Structuring the estimation of environmental liability right into the transaction is an approach employed by some sellers. Seller and buyer enter into a binding contract agreeing, among other things, to jointly investigate the property and have a contingency plan (such as price adjustments and indemnification) for a variety of potential outcomes, including an escape clause for the buyer if contamination levels exceed a certain threshold. The commitment of a defined level of cleanup funds by a responsible-party seller also provides leveraging opportunities that benefit all involved parties. Funding from the seller can be combined

with the purchaser's anticipated site preparation and redevelopment costs, government financial assistance, tax credits and environmental insurance (or guaranteed cleanup arrangements with environmental consulting firms).

Assembly of a Qualified Redevelopment Team – Effective redevelopment requires an experienced team of qualified stakeholders, including financial partners, environmental consultants, lawyers, real estate professionals, brokers and developers. Each team member must be well qualified and financially secure. Economic redevelopment is a partnership. All stakeholders enjoy the benefits and rewards of redevelopment (e.g., owners, developers, municipalities, communities and regulators). Therefore, all stakeholders should participate in the redevelopment efforts and costs.

Tools for Managing Risk

A number of tools are available through the public and private sectors that can be used to mitigate the risks associated with transferring a brownfield. Some specific suggestions include the following:

Buy/Sell Agreement Language – Owners and property managers should carefully craft purchase and sale or lease agreements so that roles and responsibilities of involved parties are clear and unambiguous. Buyers and sellers of transactions have competing concerns. A financially sound seller will want to avoid a “comeback”⁵ of the liability that the sale (and perhaps remediation) of the property was intended to divest. The seller may also want to avoid exacerbation of a liability it has already agreed to assume. A buyer will want to make sure that it is not buying a liability it did not intend to assume and that its investment in the brownfield property will be profitable.

⁵These “comebacks,” as they are known, were sold, then liability returned to the original owner because the subsequent owner: 1) Modified the use in a way inconsistent with the original purchase intent, thereby resulting in unanticipated public exposure; 2) Became insolvent, and did not complete the cleanup; or 3) Discovered previously unidentified residual contamination that they are unable or unwilling to cleanup.

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Ideas for Moving Forward

1. Improving Regulatory Certainty

One method that buyers and sellers of brownfield properties are using to control and allocate environmental liability is a sophisticated buy-sell agreement that incorporates detailed, transaction-specific language that takes property use, institutional controls, cleanup responsibilities, comfort letters offered through VCPs, the information available regarding the site conditions and the relative financial strength of the parties into account.

2. Managing Corporate Liability

Various types of risk performance measures, such as bonds and Letters of Credit (LOCs) with a staged release dependent on achieving milestones with regard to remediation plans can also be used to ensure that funds will be used for remediation purposes.

3. Incentives

4. Education and Outreach

Due Diligence on a Prospective Purchaser – An owner can make informed decisions and limit the possibility of a property “comeback” through a methodical approach to investigating prospective purchasers or developers. Creating a best practice for property owners to qualify prospective purchasers who can close a transaction will allow more corporate properties to come to the market. The best practice should include a checklist that allows a seller to systematically investigate the buyer’s qualifications, including credibility, experience with cleaning up brownfields, financial strength, end use of the development, likelihood of insolvency and ability to finance the transaction.

Environmental Insurance and Other Risk

Transfer Mechanisms – Corporations should evaluate the efficacy of environmental insurance products as part of an integrated risk management strategy. Environmental insurance can facilitate more divestitures and brownfield redevelopments by bringing more cost certainty to corporate sellers in areas such as: cleanup costs, tort liabilities, changes in regulations, regulatory reopeners and economic losses.

Environmental insurance continues to evolve as a valuable tool for managing risks associated with property divestiture and brownfield redevelopment. Insurance products are widely available. These products include pollution legal liability (PLL) and cleanup cost cap (CCC) policies, which allow parties to brownfield redevelopment to substitute a known, budgeted, fixed cost (in the form of insurance premiums and deductibles) for unknown, highly variable and potentially erroneous costs. Fixed-price remediation contracts are a related tool and could include liability buyouts and fixed fees for closure contracts from consultants.

In addition to environmental insurance and fixed-price contracts, other financial mechanisms that provide for an owner to “cash out” of environmental liability with the state or to pay for the long-term monitoring of institutional controls should be considered.⁶

⁶Except for states like Massachusetts with a privatized system under the Massachusetts Contingency Plan (MCP) and Presumptive approvals on non-priority sites without Activity and Use Limitation (AUL).

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Incentives

Increased availability of public sector incentives can enhance private property value and should be made available to attract developer interest, encourage investment and offset the risk involved in tackling the more complicated brownfield properties. Some specific suggestions include the following:

Tax Incentives – Both the federal and state governments offer tax incentives to promote brownfield cleanup projects, most targeted at private site owners. These include the federal brownfields expensing incentive (set to expire at the end of 2005), historic rehabilitation tax credits, New Markets Tax Credits, and the newly authorized UBIT (unintended business income tax) incentive for private owners who clean up large sites, as well as various income and real estate tax incentives available in nearly half the states. In addition, many local governments have focused tax incentives on brownfield sites. All these efforts should be continued and refined to better meet the needs of brownfield site developers.

Federal Initiatives – These initiatives include grants and revolving loans initiated under the US Environmental Protection Agency, US Housing and Urban Development, Economic Development Administration and the US Army Corps of Engineers. These initiatives, while primarily available to public entities or partnerships, encourage public-private partnerships and thus enhance private sector development with public sector/municipal involvement, benefiting the overall sustainability of the redevelopment.

Innovative Financial Programs – Programs for brownfield redevelopment currently exist in many states. Such brownfield grant and loan programs are typically available to municipalities, and sometimes to property owners. These programs have been well used and serve as useful models for other states.⁷ A number of them are evolving in ways that can benefit private property owners.

⁷Several states provide tax incentives. For example Ohio provides a 10-year abatement on real property tax after a property receives a covenant not to sue from Ohio EPA when a remedy has been conducted as part of the voluntary action. Another example is the Michigan Single Business Tax Credit in which funds are available for blighted and functionally obsolete properties for certain legitimate investment costs (up to 10% or \$1 million).

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Ideas for Moving Forward

1. Improving Regulatory Certainty

Education and Outreach

Outreach, through education and training, should be provided to property owners, developers and governments in order to promote and communicate changes in market conditions, laws and regulations, new products and best practices for transferring environmentally impaired properties. Some specific suggestions include the following:

2. Managing Corporate Liability

3. Incentives

4. Education and Outreach

Outreach – A public relations message needs to be broadly distributed to the redevelopment community (property owners, developers, investors, professionals service providers and government) that although brownfields can be complicated, and take time, they are “do-able.” The redevelopment market is moving forward quickly and gaining momentum from high profile successes. These successes should be systematically communicated through brownfield conferences (e.g., NBA Chapter meetings, USEPA Brownfields Conference), press articles (e.g., Brownfield News magazine) and private and municipal development forums directed to redevelopment stakeholders.

Training and education – All stakeholders, including property owners, need up-to-date information on changing brownfield reuse strategies and best practices. Accordingly, the NBA will expand its educational programs to develop additional specialized short courses, seminars and workshops that provide cross cutting training to the many public and private disciplines involved with redeveloping brownfields.

Corporate awareness of changing regulations relating to incentives – Many states and towns are offering business incentives through programs such as Enterprise Zones and Tax Increment Financing (TIF) districts. These incentives, along with VCP initiatives, (such as government approved Urban Setting Designation for groundwater), may tip the balance in redevelopment decisions where the value of the land alone does not justify redevelopment. Redevelopment stakeholders, especially municipalities and environmental consultants, need to bring this message to corporate business planning personnel so that these corporations are aware that surplus, non-strategic properties can be a financial asset if cost-effectively remediated and redeveloped.

Corporate awareness of evolving financial environmental liability reporting requirements – Publicly traded companies that own brownfield properties need to be aware of the changing financial reporting requirements with respect to the reporting of environmental liabilities (i.e. Sarbanes Oxley). Brownfield industry leaders are working with Financial Accounting Standards Board (FASB), the Securities and Exchange Commission (SEC) and other organizations to develop information and training material that is distributed to corporate property owners and keeps them up-to date on changing reporting requirements and best practices.

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Next Steps

The brownfield market is constantly changing and legislation and policy continue to evolve. This policy paper presents several ideas for property owners to consider when divesting assets. The NBA encourages corporations to get involved and provide feedback so that we can impact policy that improves market conditions.

This document presents the NBA's suggestions for advancing the brownfield market and bringing

more corporate properties to the market. The leadership of the NBA will continue to explore solutions and best practices that will help achieve these objectives. Through alignment with other organizations that support the concepts presented in this document, we will explore the formation of coalitions to further refine these suggestions. We encourage readers to provide input.

The Policy Paper Development Process

We thank the NBA Advisory Board which helped prepare this policy document by consolidating the thoughts and ideas provided by the NBA Board of Directors (BOD), Advisory Board (AB) and the State Chapter Executive Teams (ET) during the June 2004 Brownfield Leadership Summit. A draft of the document was presented at the Brownfields 2004 conference held in September 2004 in St. Louis. Comments received at that event were also incorporated into this document along with consolidated comments provided by each NBA state Chapter Executive Team. Together, the Board of Directors and the Advisory Board worked to incorporate comments and create this final document.

The NBA Board of Directors consists of six representatives of the four sectors of the brownfields market (Property Owners, Developer/Investors, Transaction Support and Public Sector). The Advisory Board consists of 16 members who represent a broad base of stakeholders that include corporate property owners, developers, municipalities, the USEPA, and professionals from the legal, insurance and environmental consulting communi-

ty. The Executive Teams from each state chapter represent a diverse group of public and private sector industry leaders that are involved with the redevelopment of brownfields at a local level. Through the representation and input of geographic, multi-sector and public and private interests, the NBA seeks to achieve a balanced perspective and present a centrist position that supports the responsible redevelopment of more brownfields. For more information on the NBA and or BOD, AB and State Chapter ET, please visit the NBA website at www.brownfieldassociation.org.

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