

Planning the Retool: Implementing the Brownfields Vision-- Laws, Tools and the Marketplace

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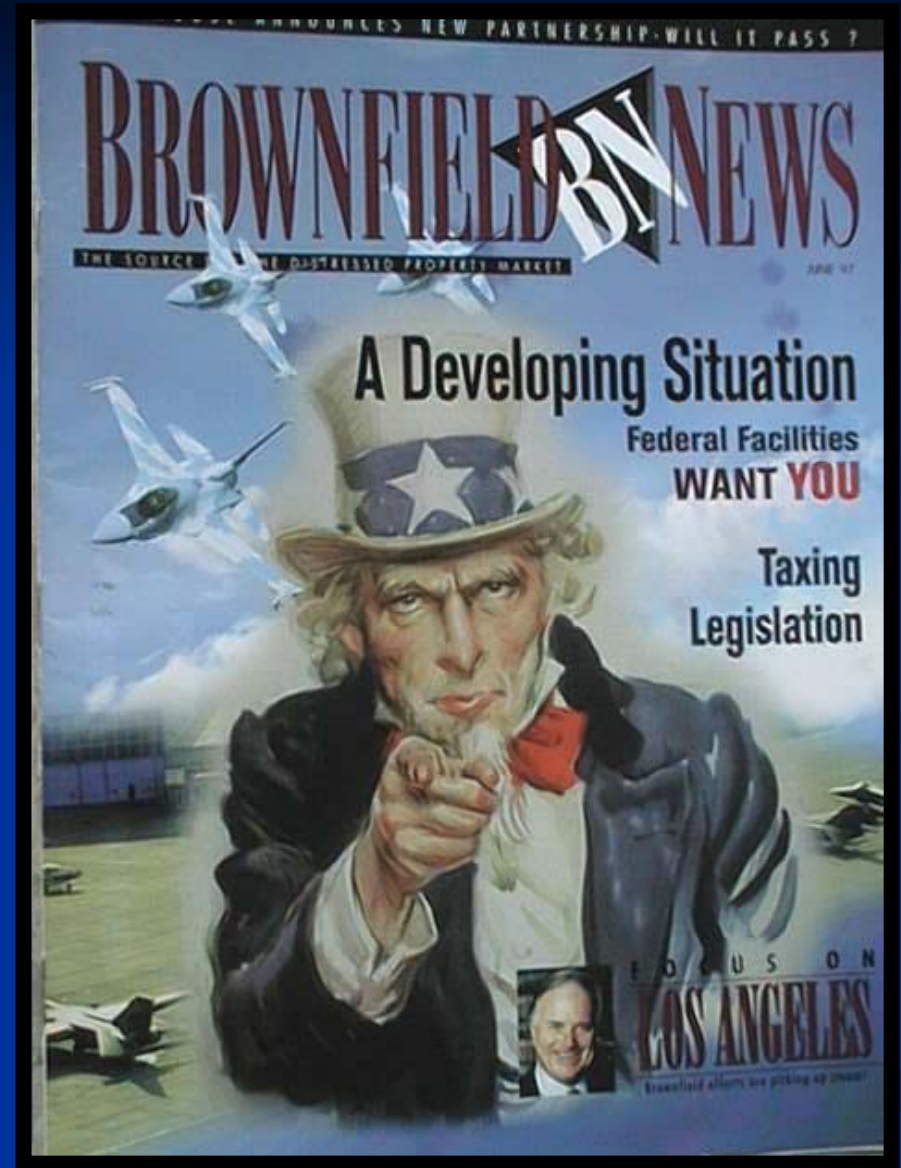
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Livable Washington
Washington APA Chapter Conference 2005

Bellevue, Monday, October 31, 2005

Current Topics

- The “Marketplace” Driver
- Incentives and Risk
- Funding
- Recent Developments
 - State (*e.g. Pending VCP Changes, Lien Bill*)
 - Federal (*AAI/Aviall*)
- Cutting Edge Issues (*e.g. Stakeholders, Deals and Residential Redevelopment*)
- Panel Role: Planning and Redevelopment Integration, Funding and Legal Issues, “Gap- Bridging ” Trends



The Basics

Brownfields vs. Greenfields

- **Brownfields**

- (reuse, redevelopment and “infill” growth)

vs.

- **Greenfields**

- (sprawl)



Real Brownfield: Renton



Sabbatical Brownfield



Real Brownfield: Bainbridge Island

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Real Brownfield: Tacoma, Thea Foss

Charles R. Wolfe, Attorney at Law

Traditional “Strict, Joint and Several” Liability Still Applies!

- Release or threatened release of a hazardous substance from a vessel or facility, associated “response costs” and potentially responsible party (“PRP”) status under CERCLA or potentially liable person (“PLP”) status under MTCA
- Basis for private cost recovery/contribution

The Classic Cleanup Process Still Applies!

- Remedial Investigation
- Feasibility Study
- Cleanup Action Plan
- Permitting
- Remedial Action
- Operation and Maintenance
 - RI/FS - CAP - PERMITS = REMEDIAL ACTION

Brownfields Incentives: Recent General Developments

Brownfields and Future Land Use

- Softening of “Command and Control”
- Evolution of the toolbox: technology, regulatory practice, marketplace sensitivity and insurance/risk transfer products
- Increasing attention to protection of future land use and “no further action”
- “What was Love Canal but a massive failure of institutional controls?”

The Brownfields Mantra: *“Site Specific Risk Assessment is Good”*

- “No longer shall we be burdened by past, foolish determinism which treated all sites alike and defined cleanups based on a regular diet of dirt.”

The Reform Backdrop

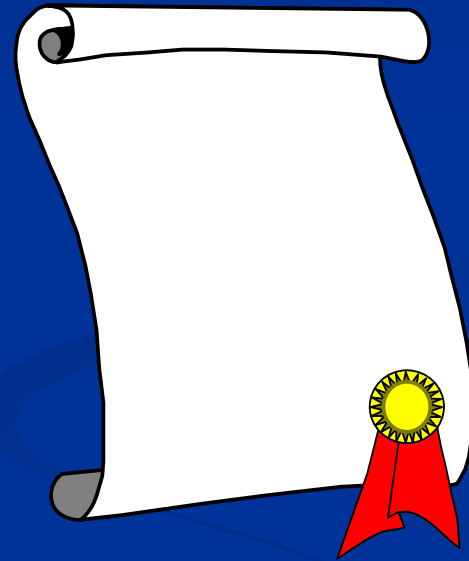
- **MTCA: Less Stringent Industrial Cleanup Standards**
- **CERCLA/MTCA: Prospective Purchaser Agreements**
- **CERCLA/MTCA: Lender Liability Exemptions**
- **MTCA: Permit Exemptions**
- **MTCA: Voluntary Cleanup Program**
- **CERCLA: 2001-02 Revisions/Ongoing Reform**

Key Concept for Complex Sites: Prospective Purchaser Agreements

- Consent Decree protection prior to purchase
- Requirements
 - Potential priority if proposal to provide substantial public benefit
 - Yield substantial new resources to facilitate site cleanup
 - Expedite cleanup

The Role of Insurance

- Remediation Cost
Capping
- Indemnification and
Financing



Reform: The National Lens and AAI

Small Business Liability Relief and Brownfields Revitalization Act

- **Marriage of two separate pieces of legislation**
 - **Small Business Liability Protection Act (Title I) (formerly H.R. 1831)**
 - **Brownfields Revitalization and Environmental Restoration Act of 2001 (Title II) (formerly S. 350)**

Small Business Liability Relief and Brownfields Revitalization Act

- Basic Components –
 - Exemptions from liability for certain classes of entities
 - Protection for parties remediating brownfield sites
 - Funding for brownfields redevelopment programs

Definition of Bona Fide Prospective Purchaser

- New Section 101(40) of CERCLA
- Only applies to persons (or tenants thereof) that acquire ownership of a facility after effective date of amendments
- Must satisfy series of conditions, including “all appropriate inquiry” standard (multi-year negotiated rulemaking almost complete)

Bona Fide Prospective Purchaser Exemption

- New Section 107(p) of CERCLA
- Exemption from current owner/operator liability for bona fide prospective purchaser whose potential liability is based solely on purchaser being considered an owner or operator, provided purchaser does not impede response actions

Bona Fide Prospective Purchaser: “All Appropriate Inquiry”

- Inquiry must be conducted before property acquisition
- Interim standard for inquiry
 - Phase 1 Environmental Site Assessment Process
 - Either ASTM E1527-97 or E1527-00 acceptable
 - Non-Intrusive Study, i.e. no sampling
 - Utilizes records research and site reconnaissance
 - CERCLA § 101(35)(B)(iv)(II), 40 C.F.R. pt. 312
- EPA must have permanent standard by January 2004, in actuality will be late 2005

All Appropriate Inquiry Criteria

1. Inquiry by Environmental Professional
2. Interview with owners/operators
3. Review of historical sources
4. Search for recorded environmental liens
5. Review of government records
6. Visual inspection of property/adjoining sites
7. Special knowledge of parties
8. Purchase price review
9. Common knowledge of site conditions
10. Obviousness of impacts

All Appropriate Inquiry Rulemaking

- New federal negotiated rulemaking; not MTCA
- Interviews, source/record review, inspections
- Fair market value determination
- New professional standard for consultants?

Aviall: A New Hurdle to Cost Recovery?

- December 13, 2004 Supreme Court Decision and Voluntary Cleanups Under CERCLA
- The CERCLA 107/113 Contribution Debate and Agency “Civil Action”
- Limited Decision: Section 113 of CERCLA
- EPA Revision of AOCs
- Continuing Viability of State Statutes and Common Law for Private Rights of Action in Washington

Reform: The MTCA Lens

Model Toxics Control Act

RCW 70.105D

- Modeled on Superfund
- Includes petroleum as hazardous substance; pioneering plume exception
- Similar defenses
- *Cleanup levels (Method A, B, C)**
- Similar secured-party exemption
- Private Right of Action includes attorney fees

State (Washington MTCA) Reform Examples

- **Less Stringent Industrial Cleanup Standards, Site Specificity and Remediation Levels**
- **Prospective Purchaser Agreements**
- **Lender Liability Exemption**
- **Permit Exemptions**
- **“Plume Clause”**
- **IRAP (VCP), NFA’s and Opinion Letters**

Pending VCP Changes

- Initial New Form Letters 8/05, New Form Guidance 2006?
- “NFA” Means NFA!
- Alternatives to Interim NFA’s and Conditional NFA’s: The Technical Opinion Letter
 - Media and Area-Specific “Interim” NFA’s: No Longer
 - Conditional NFA’s (removing from Confirmed and Suspected Site List upon monitoring and/or Restrictive Covenant recording): No Longer

The Technical Opinion Letter

- Does Not Contain the Words “No Further Action”
- Not a Formal Settlement, But Neither is NFA Letter
- Can Legitimize Practical Solutions, e.g. Design Solutions Which Achieve Containment and/or “Protectiveness”
- Marketplace Significance?

Reform and Enabling Redevelopment: The Integrated Lens

Integrated Reform Backdrop

- 1995 GMA, SEPA and SMA amendments
 - Development agreements as a tool for assuring long-term project phasing
 - Permit coordination among all agencies with jurisdiction over a given site
- Less Stringent Industrial Cleanup Standards: GMA Link as Basis for Expanded Industrial Property Definition*

Integrated Reform Backdrop

- **SEPA/MTCA Integration***
 - SEPA regulations now allow flexible review of a cleanup action integrated with a development project.
- **Permit Exemptions***
 - Procedural preemption of certain agency and local government permits otherwise required for cleanup activities

SEPA/MTCA Integration

- Applies to Consent Decrees and Orders
- Emphasis on Early Identification of Impacts
- Lead Agency Coordination
- Dovetailing of RI/FS and Threshold Determination
- DNS Timing (RI/FS to Draft CAP)
- DS Timing (Coordinated with MTCA Public Participation Elements)

Beyond Kelo v. New London: Community Renewal Law Key Definitions

- “Redevelopment”
- “Rehabilitation”
- “Blighted Area”
 - Public health and safety basis*
 - “Hazardous soils or substances” as a factor in the definition of the blighted area
 - Land use/economic basis

Process: The Community Renewal Plan

- Plan is Core of a Community Renewal Program
- Components, Including GMA Consistency and Specificity
- Public Notice and Council Adoption at Public Hearing
- Required Findings

The Cutting Edge: Practical Issues

Key Points Regarding Redevelopment

- **Applications of the Brownfields Toolbox With Emphasis on Protectiveness and Future Controls and Obligations**
- **Project Design and Integration with Cleanup: Regulatory Closure and a Financeable Project**
- **How to Manage Future Obligations: Who Will Mind the Ship?**

Project Design and Integration with Cleanup

- **Early Roadmapping: Roads to Protectiveness and Stakeholder Satisfaction**
- **Interface with Liability Solutions: What is Acceptable Risk?**
- **Removal versus Containment**
- **Protective Development Features**
- **Restrictive Covenants**

How to Manage Future Obligations

- **Interface with Project Design**
- **Operations and Maintenance; Long Term Monitoring**
- **Tools: Closure Specifics, e.g. Certificates of Completion, No Further Action and Opinion Letters**
- **Disclosure Obligations to Future Residents and Developer Role**

Challenges of Project Approval: Stakeholder Perspectives

Stakeholder Perspectives

- **Special Issues and Risk Avoidance**
 - Legalities, the Marketplace and Practicalities
 - Governmental Tools and Perspectives
 - The Developer's Perspective

- **Example: EHA/ASARCO**
 - Housing Authority, City and Private Parties
 - Multiple Consent Decrees
 - Grant Resources
 - Facilitating Cleanup, Housing and Property Reuse

Step 1

Asarco

- EHA buys 15 Asarco Houses for \$2+M
- Asarco uses the \$ to remove soil above 3000 ppm in the Fenced Area in 2004

Everett Housing Authority



Step 2

Asarco

- EHA buys Fenced Area for \$1+ M after Ecology cert (8/04)
- Asarco uses the \$ to: (a) remove soil in Fenced Area & (b) clean rest of R-2 zone to residential standards at all 15 Asarco Houses and 22 non-Asarco Houses

Everett Housing Authority



Step 3

Asarco

- Asarco caps Fenced Area with 2+ feet of topsoil; Ecology certifies cleanup to residential standards to EHA
- EHA rehabs & sells 8-15 Asarco Houses (\$150K+ ea) for \$1-2 M
- EHA sells Fenced Area lots (\$30K ea) for \$3M

Everett Housing Authority



Agreements & Approvals Needed

City Actions/Agreements

- EHA/City agreement & contingent loan agreement for repayment of line of credit
- City designations of blight, community renewal area, and EHA as community renewal agency (so EHA can sell the cleaned up property)
- *Later:* City approval of community renewal plan/project & processing of R-1A rezone, subdivision applications, etc.

Key EHA Approvals Needed

- Purchase & Sale and Remediation Agreements with Asarco (for Asarco to sell the property & do the cleanup)
- Prospective Purchaser Agreements with Ecology (to limit liability); deed restrictions
- EPA and Ecology grant and trust fund approvals
- EPA approval order for disposal of all soils at Asarco Tacoma

Lawyer/Planner Practical Counseling

- **Market Perception of Nature and Extent**
 - Extent of liability
 - Complexity of negotiations
 - Likely land use restrictions
 - Marketplace knowledge and stigma
 - Investment of income stream



Take Away:
Property Context?
Appropriate Closure?
Control of Contingent
Risk?

- Legal
- Technical
- Financial
- Underlying
Process