

Infill Development, Related Issues and Project Examples

Presented by
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Also Known as...

Doing Well by Doing Good: The Development of Redevelopment and Changing Face of Infill Development

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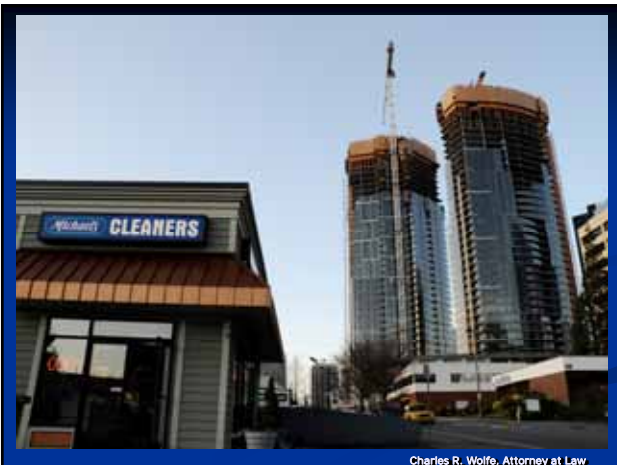
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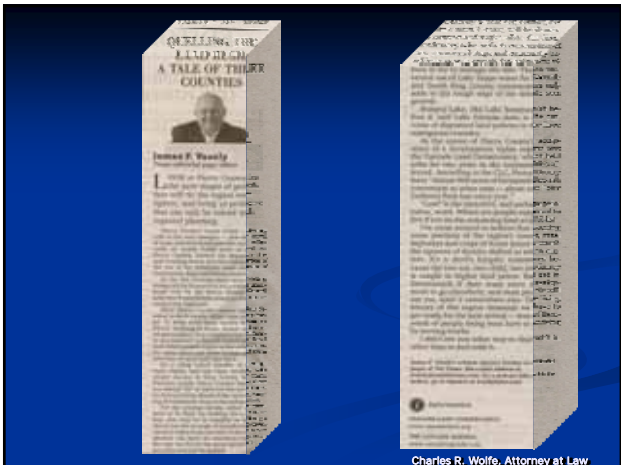
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The General Redevelopment Spirit: Doing Well by Doing Good

- Best Practices
- Land Redevelopment/Conservation Focus
- Sustainability: Think Globally, Act Locally?
- Mainstreaming Sustainability, Green, Ecotourism, Climate Change and Global Warming
- Has “Tragedy of the Commons” Arrived?
- Building Broad-Based Coalitions, Stakeholders and Unexpected Friends

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Amid Today's Issues, Expectations and Economic Turmoil

- More Height
- More Affordable Housing
- Less Traffic
- Less Parking
- Less Sprawl
- Address Site Constraints
- Private Burden for Public Benefit



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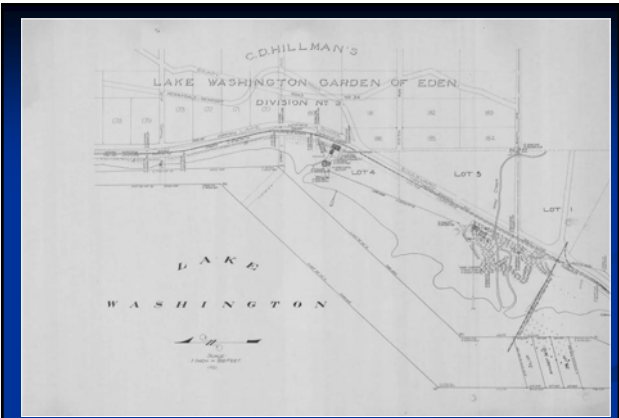
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Finding the Best Way to Address Site Constraints and Often Liability...

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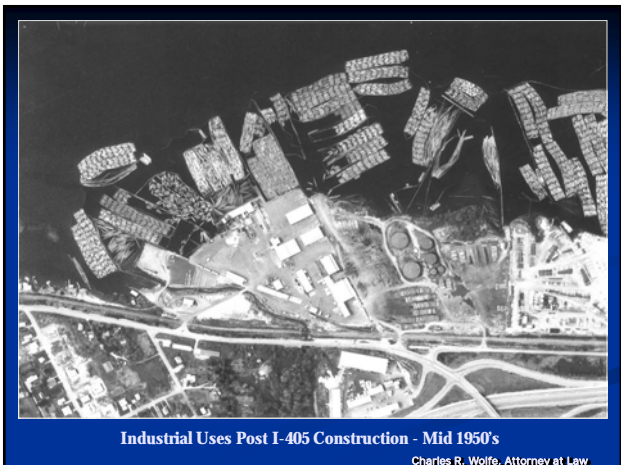
Early 1920's Plat of Port Quendall Area

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Early Saw Mill Fire at Baxter Site - Circa 1930's

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Industrial Uses Post I-405 Construction - Mid 1950's

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To Facilitate a Transformation from Here....

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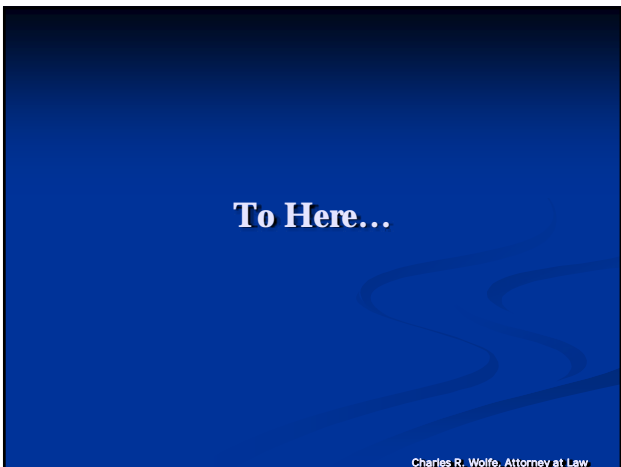
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"In less than six months, Triad Development transformed the former American Tar Co. site – just north of Gas Works Park on Lake Union – from a brownfield to prime property suitable for an upscale condominium complex. Triad removed decades-worth of paint thinners, solvents and creosote from the 1.3-acre site, in what Ecology officials say was one of the most rapid cleanups in the agency's history." (DJC, June 2000)



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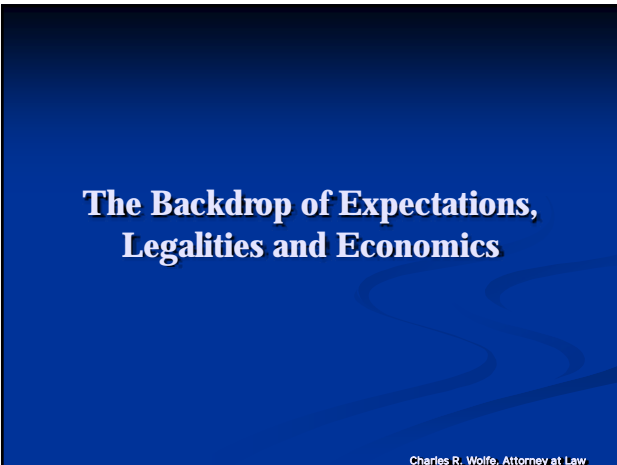
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The Literal and Figurative Drivers

- Approaching 20 Years of GMA
- Density and Changing Neighborhood Character
- Developable Land Limitations: Critical Areas, Brownfields
- Deemphasis on Classic Use Separation and Parking and Automobile

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The Redevelopment Challenge: Balancing the Marketplace, Affordability and Quality of Life

- Rational land assembly and regulatory compliance while assuring feasibility
- Implementation of infill redevelopment costs more!
 - Blending of old and new
 - Addressing neighborhood character
 - Public sector-mandated regulatory consistency, resource and human health protection

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Implementation Issues

- Plan/regulatory amendments to avoid “Euclidean” tradition
- Development regulations/SEPA may mandate view preservation
- Impacts on historic buildings
- Cost effective compliance with building, seismic and fire codes; “green” building considerations
- Management of impacts on neighbors: regulatory/public perception standpoints

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Understanding Development I

- **Urban Expectations of Project Panaceae: Affordable Housing and Transportation**
 - Resolution within pro forma
 - Balancing funds between housing/transportation and design/constructability decisions on complex sites
 - Constrained sites/demolition
 - Quality of materials

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The Brownfields Gloss: Competing Policy Choices and Recent General Developments

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Brownfields vs. Greenfields, Reuse of Land v. Protectiveness

- **Brownfields**
 - (reuse, redevelopment and “infill” growth)
- **Greenfields**
 - (sprawl)



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Contamination and Brownfields

- The “Marketplace” Driver v. “permanence to the maximum degree practicable”
- Assurance v. enforcement
- Forms of assurance
- Staff availability
- Cutting Edge Issues (e.g. Stakeholders, Residential Redevelopment, Liability Apportionment (BNSF Case))



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RCW 70.105D.010(4)

(4) It is in the public's interest to efficiently use our finite land base, to integrate our land use planning policies with our clean-up policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.

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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

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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

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Getting There: 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?”

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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.”

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Getting There: 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***

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Foreshadowing the Tools: Project Design and Integration with Cleanup

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

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Foreshadowing the Tool Choice: (Letters, Orders, Decrees): Pointers

- **Market Perception of Nature and Extent**
 - **Extent of liability**
 - **Complexity of negotiations**
 - **Likely land use restrictions**
 - **Marketplace knowledge and stigma**
 - **Investment of income stream**
 - **Third party funding/grants**
- **Countervailing Concerns: Protectiveness, Staffing and Precedent**

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ASTM as Symbol and Tone Setter

- **Standard Guide for Brownfields Redevelopment (E 1984-03)**
 - **Initiation**
 - **Evaluation**
 - **Transaction**
 - **Implementation**
- **Stakeholders Focus**
- **Voluntary Consensus Document**

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ASTM Take Aways

- **Property Life Cycle, Risk and Viability**
- **Streamlining**
- **Public Participation**
- **Select Roles for State and Local Government: Planning for Areawide Development, Streamlining in Permitting**
- **Key Query: Who Finances the Jumpstart?**

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Reform: The National Lens and AAI

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Small Business Liability Relief and Brownfields Revitalization Act - H.R. 2869

- Culmination of many years of effort to amend CERCLA
- Most significant changes to CERCLA since the Superfund Amendments and Reauthorization Act of 1986
- Passed by House on voice vote and unanimously by the Senate on December 20, 2001
- Presidential signature on January 11, 2002

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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)

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Small Business Liability Relief and Brownfields Revitalization Act

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

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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 recently completed)

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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

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Bona Fide Prospective Purchaser: “All Appropriate Inquiry”

- Inquiry must be conducted before property acquisition
- Interim standard for inquiry
 - Phase I 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 occurred late October, 2005

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All Appropriate Inquiry Criteria in Final Rule

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

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All Appropriate Inquiry Rulemaking

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

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Reform: The MTCA Lens as Example

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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

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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

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The VCP and Recent Changes

- Initial New Form Letters 8/05, New Form Guidance and Revised Form Letters 2008
- "NFA" Means NFA!
- Alternatives to Interim NFA's and Conditional NFA's: The Technical Opinion Letter
 - Media and Area-Specific "Interim" NFA's: Evolving
 - Conditional NFA's (removing from Confirmed and Suspected Site List upon monitoring and/or Restrictive Covenant recording): No Longer

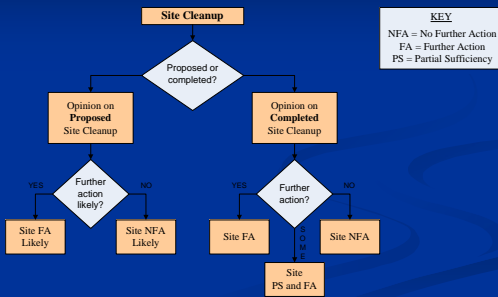
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The Technical Opinion Letter

- 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?
- Credit to Michael Feldcamp, Ecology

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Types of Opinions: Site Cleanup



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Ecology’s Square Peg, Round Hole

- Definition of Site (round hole)
 - A Site is defined by the nature and extent of contamination associated with one or more releases. See RCW 70.105D.020 and WAC 173-340-200.
 - Liability for cleanup of the Site is joint and several. See RCW 70.105D.040.
- Cleanup of Property (square peg)
 - Owners usually only want to clean up contamination present on their own property, not the entire site
- Law of Nature vs. Law of Man (not quite fit)
 - Challenge of reconciling cleanup law and property law

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Challenges

- The cleanup of a Property, instead of the entire Site within which the Property is located, presents numerous technical (and thus regulatory) challenges
- For example:
 - How do you establish cleanup standards for the Site when the standards must be protective of media or receptors located off-Property
 - How do you select a cleanup for the Property that is consistent with the cleanup for the Site as a whole?
 - How do you prevent recontamination of the Property
- These technical challenges are not unique to independent cleanups

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Adopted Solution

- Provide **opinions** on whether further action is necessary on the Property and, if so, whether further action is still necessary elsewhere at the Site
- Identify **criteria** that help answer the question of whether further action is necessary at the Property. Criteria are based on substantive requirements of MTCA
- Provide **guidance** to site managers and property owners that explains the criteria and the meaning of the opinions

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Adopted Criteria

1. That no further action is necessary to **establish** cleanup standards for the Site
2. That no further action is necessary to **achieve** Site cleanup standards on the Property
3. That no further action is necessary to **prevent** recontamination of the Property

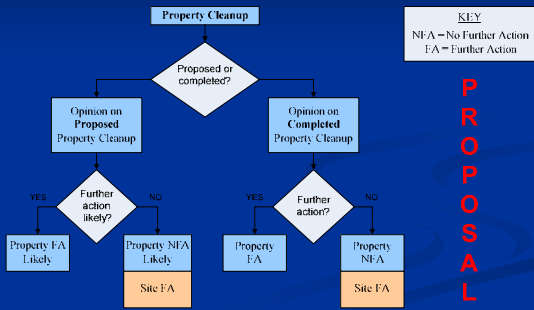
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Proposed Opinion Letter

- Describe the Property, and the Site within which the Property is located
 - Diagram of Site
 - Legal description of Property
- State whether further remedial action is necessary at the Property
 - Based on Criteria
- State whether further remedial action is still necessary elsewhere at the Site

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Types of Opinions: Property Cleanup



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What does Property NFA Mean?

- That no further action is necessary to achieve Site cleanup standards at the Property
- If cleanup conducted was not permanent, that post-cleanup controls (e.g., covenants) are necessary to maintain compliance with Site cleanup standards at the Property
- That further action is still necessary elsewhere at the Site to achieve cleanup standards
- That the Site will remain listed on the Hazardous Sites List (if listed), and the Property will remain listed as part of the Site

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Property NFA does not...

- **Change the definition of the Site**
 - See RCW 70.105D.020
- **Change or settle liability with State**
 - See RCW 70.105D.040
- **Provide protection from contribution claims**
 - See RCW 70.105D.040
- **Constitute a determination that the independent cleanup is the “substantial equivalent” of an Ecology-supervised cleanup**
 - See RCW 70.105D.080
- **Mean that local governments are eligible to receive grant funding under Chapter 173-322 WAC**

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Reform and Enabling Redevelopment: The Integrated Lens

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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***

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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

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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)**

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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

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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

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In the Trenches: Assuring Success and the Right Tools: Complexity, Staffing, Stakeholder Needs, Timing and All That!

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Understanding Development II: Liability Resolution and the Overall Project

- Resolution within pro forma
- Balancing funds between other requirements such as affordable housing/transportation and design/constructability on complex sites
 - Constrained sites/demolition
 - Quality of materials
 - Remediation expenses, cost of ongoing risk and assuring future income stream while protecting future stakeholders

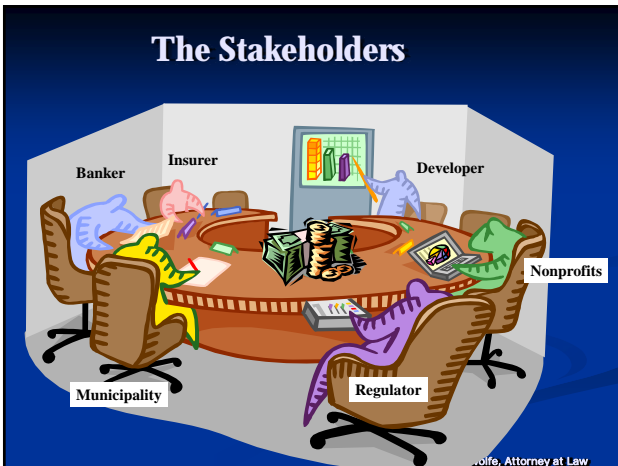
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Key Points Regarding Redevelopment

- 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?

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The Stakeholders



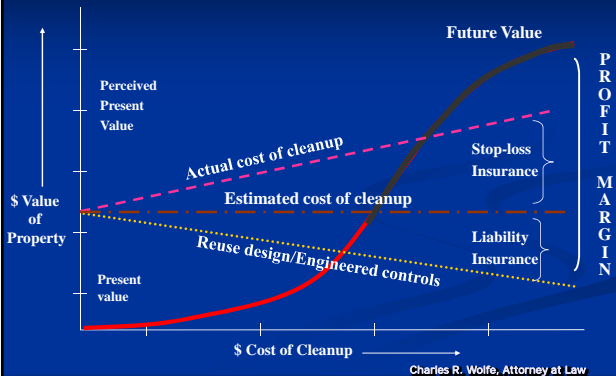
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Managing the Risks

- Economic viability
 - Is the project economically sound?
 - How much will it cost?
 - What's the return on investment?
 - Where's the money coming from?
 - How long will it take?
- Financial risks
 - How can the risk of unexpected loss be managed?
 - Discovery of new contaminants
 - Failure of controls
 - Firm regulatory decision

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Managing the Risks - Economics



Finance Issues

- **Uncertain cleanup costs for known contamination**
- **Potential cleanup costs for unknown contamination**
- **Delayed completion** (known or unknown contamination)
 - "Soft" costs
 - Loss of profits
- **Ability to obtain/cost of debt/equity financing**
- **Buy/sell "as is" below market value?**
- **Cleanup and sell at higher market value?**
- **How can I cleanse my balance sheet of the environmental liability?**

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The Role of the Insurance Tool

- **Remediation Cost Capping**
- **Pollution Legal Liability**
- **Contractor Coverage**
- **Insured Contracts**



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Environmental Insurance / What are the Goals?

- A dynamic information exchange between insurer and insured
 - Insurers: understand and quantify risk
 - Insureds: provide information to allow definition of risk (make the insurer “comfortable” with the risk)
- Key to the exercise -- Balance the exchange
 - Provide sufficient information / data to define the risk
 - Retentions / Deductibles
 - Coverage provided by the policy
 - Price of the insurance vs. risk that is transferred

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Insurance Solutions to Manage Concerns

- Environmental Insurance Products
 - Pollution Legal Liability (PLL)
 - Cleanup Cost Cap (i.e.-Environmental Remediation Stop Loss)
 - Blended PLL/Cost Cap/Finite Risk Programs
 - Secured Creditor & Financial Institution Coverage
 - Owner Controlled Environmental Programs

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Legal Issues

- Third Party Liability (“Toxic Tort”)
 - bodily injury, property damage
 - diminution of value
 - natural resources damages
- Regulatory Closure/”Reopeners”
- Indemnification Agreements

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Key Regulatory Tools for Formal, Complex Sites

- **Agreed Orders**
 - Often used for interim actions
 - “Four corners” protection
- **Prospective Purchaser Consent Decrees**
 - 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

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Voluntary v. Formal: Project Design and Integration with Cleanup

- **Early Roadmapping: Roads to Protectiveness/Stakeholder Satisfaction**
- **Interface with Liability Solutions and Other Tools: What is Acceptable Risk?**
 - Indemnities, Set Asides, Trust Funds, Insurance
- **Removal versus Containment**
- **Protective Development Features**
- **Restrictive Covenants**

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Voluntary v. Formal: 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**

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Voluntary Program Examples and Why

- Qwest Field (1998-2002)
- Ballard and the Drycleaner Across the Street (2004)
- Westlake, South Lake Union and the Inaccessible Contained Contaminant (2000, 2005)
- Eddon Boatyard, Gig Harbor (2005-)
- Various Technical Opinions in King, Kitsap and Pierce Counties for Site Resolution or in Support of Cost Recovery/Insurance

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Formal Program Examples and Why

- Manhole 34/Sunnyside (1990-2004)*
- Nortar/Regatta Condominiums (1999-2000)
- J.H. Baxter Properties (Seahawks) (2000-)
- Thea Foss Site 5 (2005-2006)
- Everett Housing Authority/ASARCO (2004-2006)
- City of Bainbridge Island/Pritchard Park (2005-)
- Seattle Goodwill/Dearborn Campus (2005-)
- Pending: Urban Mixed Use Infill, Retirement Facility, Housing for Google and 2008 Meltdown

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A Digression and Case Study Lessons



Reproving the Brownfield Assumptions

- Change is Continuous
- Costs Often Remain Uncertain
- Always Potential for Future Disputes

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The Catch-22 of Remediation v. Development Costs

- Development Often Triggers Cost Recovery Efforts: The Garage Hole Battle
 - “You are developing so it is a development cost!”
 - “You are strictly, jointly and severally liable, so it’s a cleanup cost.”
 - “What percentage of the soil which you sent to the facility was above MTCA Level A?”
 - “It is appropriate for you to pay for Class II soils which could not be reused on site...”
 - “That vapor extraction system in the garage was for a development feature!”
 - “It was not practicable/ cost effective to do this any other way!”

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The Catch-22 of Remediation v. Development Costs

- Highly Site Specific, But Some Universals
 - If a fight, it can be expensive
 - When does risk management become recoverable remedial action costs?
 - Appropriate site-specific management of soils v. MTCA triggers: the practicability dance
 - Importance of documentation
 - MTCA is flexible
 - God’s gift to field labs can also be eyes and a nose...

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The Catch-22 of Remediation v. Development Costs

- WAC 173-340-545 et seq. re “substantial equivalence”
 - Heavy dependence on site context and circumstance
 - “[T]he requirements in this section will be analyzed as a whole...”
 - “[A] claim will not be disallowed due to omissions which do not diminish the overall *effectiveness* of the remedial action” (see Taliesen)
 - Use of other documents allowed
- “[I]t should be recognized that there are often many alternative methods for cleanup of a facility that would comply...”

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The Catch-22 of Remediation v. Development Costs

- The Cases are Only Snapshots of Battles that Went to Court
- The Real Precedent is in the Trenches
 - Hopelink 2002: A War Story
 - Integrated cleanup
 - Groundwater and Kelsey Creek receptor
 - Experts disagree
- Plan Your War Story
 - Theories of recovery
 - Compliance approach
 - *VCP letter may not be the critical path and is not de facto evidence of substantial equivalence*

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Denouement and Doing Good Examples!

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Doing Good: City of Bainbridge Island/Pritchard Park Development

- City of Bainbridge Island: Park on Superfund Site
- Liability concerns on the purchase of the property from Trust notwithstanding EPA PPA and Ecology AO
- PLL Policy crafted that provides coverage for:
 - Unknown Preexisting conditions
 - New Conditions
 - Regulatory Reopeners
 - Natural Resource Damages
 - 10 year policy length

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Doing Good: Example

■ Everett Housing Authority

- Housing Authority, City, ASARCO and Private Redeveloper
- Multiple Consent Decrees
- Grant Resources
- Facilitating Cleanup, Housing and Property Reuse

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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 rezoning, 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

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“A major milestone was reached recently. After Asarco removed the most highly contaminated soils from the site, the Everett Housing Authority took over the former smelter property and the cleanup, with help from Ecology and the City. The housing authority sold the cleaned up property to Barclays North, Inc. New townhouses are planned on the site of the former smelter.”
(City of Everett Website, May 2006)


Charles R. Wolfe, Attorney at Law

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




Charles R. Wolfe, Attorney at Law

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




Charles R. Wolfe, Attorney at Law

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 (\$120K+ ea) for \$1-2 M
- EHA sells Fenced Area lots (\$30K ea) for \$3M

Everett Housing Authority



Charles R. Wolfe, Attorney at Law

Take Aways

- Doing Well by Doing Good
- Redevelopment Balance and Brownfields Gloss
- Property Context?
- Appropriate Closure?
- Control of Contingent Risk?
 - Legal, technical and financial
- Underlying Process

