institutions, local governmental units or industrial authorities, and other entities interested in improving property or otherwise enhancing its value or reducing exposures arising from its environmental condition. These entities should expect their lawyers to provide them with representation and advice with regard to actual and potential liability, remediation, reuse, financing, sale, lease, donation, and strategic stockpiling of Brownfield properties.

In addition to providing their clients with counsel on assessment of liability, the lawyers for the interested parties should offer representation in the following areas:

- negotiating cleanup obligations commensurate with land use and property value,
- negotiating liability limitations between buyer/seller, lessor/lessee, lender/borrower, and owner-developer/builder-engineer,
- negotiating title acquisition,
- preparing appropriate construction documentation mindful of the environmental issues,
- acquiring liability limitation insurance,
- preparing appropriate land use controls (such as deed restrictions and mandatory maintenance and operation requirements to assure the continuing viability of remedial schemes),
- attending to the special requirements of lending institutions and local authorities, and
- providing advice on funding of Brownfields cleanup and development through creative financing including loans, grants, bonds, and tax increment financing.

At any one or more times during the assessment, remediation, transfer, and development of a Brownfield property, as well as with regard to any transaction involving such a property, an interested party may require legal services in the following areas:

- environmental law,
- real estate,
- project finance,
- construction law,
- insurance,
- government contract law,
- governmental relations,
- commercial or corporate law, and
- international or trans-national law

When searching for an attorney to provide counsel in any such role, the interested party should inquire about the lawyer's specific Brownfields experience. Practical real-life examples in any particular context may give some lawyers an edge over others, e.g., having obtained a release for or covenant not to sue a client from a regulatory agency, having successfully negotiated an indemnity provision in the purchase or lease of a Brownfield property, or having developed a workable financing mechanism for development of such a property.

In conclusion, lawyers can serve a pivotal role in helping to develop the economic potential in Brownfield properties. Parties interested in the remediation, use, and development of these properties should keep in mind how their attorneys can best serve them in this complex and challenging field.

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Development of Brownfield Properties: What the Lawyer Can Do to Help

Brownfield properties present intriguing and difficult, yet potentially unparalleled opportunities for development by both public and private entities. The liabilities associated with these actually or apparently contaminated properties should concern any party considering the purchase, sale, leasing, financing, development, or remediation of a Brownfield site. Owners, purchasers, lessors and lessees, and developers of environmentally contaminated properties, as well as their lenders and the local government agencies with whom they must interact, should not ignore the importance of having an experienced lawyer to advise them on any Brownfields transaction. This article provides a brief overview of the liability picture associated with Brownfield properties and of the services that a party contemplating a transaction involving a Brownfield property should expect from its lawyer.

What are Brownfields?

A Brownfield is any real property which, due to actual or suspected environmental contamination, may lie idle, unoccupied, underutilized, unused, or have any one or combination of these characteristics. A Brownfield may be industrial, commercial, agricultural, or even residential. In many, if not most instances, a Brownfield will not be the subject of an active investigation, remedial, or enforcement action by the U.S. Environmental Protection Agency (EPA) or a state environmental agency, although it may be.

The contamination at a Brownfield may stem from activities that took place or conditions that arose before current ownership and operation of the property and as a result of lawful non-negligent conduct. Liability for Brownfields cleanup arises under the federal Comprehensive Environmental Remediation, Compensation, and Liability Act ("CERCLA" or "Superfund") and similar state statutes, as described in more detail below, and extends to all past and current owners and operators of the property and to any party responsible for generating or transporting any hazardous substances requiring cleanup at the property. Liability under this scheme is "joint and several," i.e., each potentially responsible party ("PRP") bears the entire responsibility for all remedial expenses to a person who cleans up a site, notwithstanding the amount or

nature of contamination for which the PRP may be individually responsible. Allocation among PRPs usually takes place in lawsuits or in other adversary contacts in which the PRPs seek equitable contribution among themselves. This liability scheme has discouraged parties who own properties which they believe may have contamination from putting these properties on the market and likewise has discouraged parties who could purchase and rehabilitate these properties from doing so.

The Liability Scheme

The liability scheme of CERCLA can be summarized in four words: joint, several, strict, and retroactive. Liability will attach to any party that has any connection with a site that contains hazardous materials. For CERCLA purposes "connection" means owning the property, operating the property, or having brought materials to the property, and there was a release from the property that prompted investigation and remediation.

An entity that undertakes the investigation and remediation at the site (i.e., the government or a private party) may sue any PRP connected to the site in a "cost recovery" litigation. "Joint & Several" liability means that every PRP is liable for the entire cost incurred for investigation and cleanup. Thus, if one PRP who contributed 99% of the contamination at the site has dissolved or otherwise cannot pay its share, but two other financially viable PRPs remain, each of whom contributed only 0.5% of the contamination, those two viable parties will each be required to participate in paying not a combined 1%, but 100% of the cleanup cost (although they may argue with one another over how to split that cost). Given that the average cost of a cleanup initiated by EPA under CERCLA amounted to about $30,000,000 in the 1990s, this division of responsibility among PRPs often led to expensive and protracted litigation.

"Strict" liability means that the manner in which the PRP managed the site or the contamination makes no difference to liability: one need not have been negligent nor have intended to cause a release of contamination in order to be subject to liability. Thus, the mere fact that a release occurred from a property which required cleanup makes all connected parties responsible for the cleanup cost. "Retroactive" liability arises in the context of a site operating prior to CERCLA's 1980 passage, even if managed lawfully and pursuant to current state of the practice. Retroactive laws are usually considered unconstitutional, but the government argued and the courts agreed that CERCLA's retroactivity withstands constitutional scrutiny because it is a "remedial" statute.

The Love Canal case from western New York state during the late 1970s could be considered the "granddaddy" of hazardous waste sites that gave birth to CERCLA. This was the first high profile failure of an institutional control: the breach of a cap over an old hazardous waste landfill on a property which contained a deed restriction that was supposed to bar such an event. Congress over-reacted to the Love Canal incident with the passage of CERCLA. One of the great, regrettable, and unintended results of this well-motivated statute was the boarding up of properties. CERCLA's draconian liability scheme inhibited property owners from putting Brownfield properties on the market for development lest they be stuck with this liability and similarly inhibited purchasers from acquiring and developing these properties for fear of inheriting such liability.

The National Brownfield Association (www.brownfieldassociation.org), an organization made up of stakeholders in Brownfield properties, recently conducted a survey that tracked the sale and development of industrial properties from pre-1980 (when CERCLA was enacted) until the late 1990s. In the 10 years before the enactment of CERCLA, the survey found a steady increase in the purchase and development of industrial properties. With the passage of CERCLA, however, came a precipitous decline. Then, in the mid 1990s, when the states became more aware of a Brownfields problem created by the CERCLA liability scheme, and they started enacting voluntary cleanup initiatives, a renaissance emerged in the development and marketing of environmentally impaired properties. This trend has continued with the enactment and signature in January, 2002, of the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Revitalization Act).

Programs to Remediate and Develop Brownfields

Recent developments in federal and state law, as well as creative transactional lawyering, have made it possible for Brownfields to be developed in such a way as to protect the parties from onerous potential liabilities.

The Brownfields Revitalization Act, referred to above, amended CERCLA by providing significant liability protection for Brownfield developers, including prospective purchasers, innocent landowners, and owners of contiguous properties. In the new law's most significant change to the system of joint, several, strict, and retroactive liability, it exempts bona fide ***prospective purchasers*** of contaminated properties, provided that such purchaser "does not impede the performance of a response action or natural resource restoration." It also provides similar protections to qualified ***owners of properties contiguous to contaminated sites***. The Act removes a party who qualifies as a "bona fide prospective purchaser" or as a "contiguous property owner" from CERCLA's definition of a PRP. It also clarifies the existing ***"innocent landowner"*** defense in CERCLA to allow current owners to rely (pending publication by the U.S.E.P.A. of its own regulations) on site assessment standards published by the American Society of Testing of Materials ("ASTM") to demonstrate their having made "appropriate inquiry" about the property before its purchase. Further, the Act provides that parties, even current owners, who do not qualify as "innocent," but who clean up contaminated sites under state programs (as discussed below) generally need fear no further cleanup enforcement by the U.S.E.P.A. The Act also provides $200 million for states to develop and expand environmental cleanup programs. By mitigating the legal risks associated with Brownfields development, this law is intended to foster Brownfields redevelopment projects.

Further, more than 40 states have adopted, either by statute or administrative directive or regulation, programs for the voluntary remediation of Brownfield properties. These programs facilitate the sale and redevelopment of Brownfields by allowing cleanups based on site specific use and risk-based standards in lieu of an inflexible standard which may be technologically or financially infeasible. These programs also provide binding government approvals which allow parties in real estate and commercial transactions to quantify risk. In Pennsylvania, for example, buyers can receive from the Pennsylvania Department of Environmental Protection (DEP) covenants not to sue pending DEP's approval of a seller's cleanup action. Even in states without voluntary cleanup programs, Brownfields development and avoidance of liability associated with Brownfields may be achieved within the context of traditional transactions through the use of appropriate liability shifting, indemnification, and insurance mechanisms

In the international arena countries all over the world have begun to take measures to recover from the ill-effects of unfettered industrialization and the consequences of war and civil strife. Vital programs for the redevelopment and reuse of Brownfield properties exist in Canada, the United Kingdom, Germany, the Czech Republic, and Lebanon, to mention only a few. The largest of all areas of Brownfields activity may be the process established by statutes dealing with the United States government's Base Realignment and Closure ("BRAC") program. In order to soften the economic distress to local communities resulting from military base closures, Congress has created mechanisms to encourage the commercial reuse of such property. These bases have extensive infrastructure associated with them which present attractive redevelopment opportunities. Many BRAC properties, however, also come burdened with significant pollution from prior activities. Thus, "local reuse agencies" and developers need to ensure that the government retains the liability for cleanup and to draw a clear demarcation separating new activities at the site from pollution left over from the past. Moreover, while the exact cleanup requirements and mix of liability restrictions or incentives generally vary according to the unique facts of each base, developers will always seek the maximum availability of funds from the government to assist in the transition of a BRAC site to private sector ownership or operation.

What Can the Lawyer Do to Help?

These developments directly effect current owners, potential purchasers and lessors, developers, lending