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The Brownfield Priority

'Brownfield' does not only mean loans, grants and tax credits

By Steve Barnett

'Brownfield' doesn't just mean loans, grants and tax credits, but can also mean liability protection and faster cleanups. And the term can be applied to almost any contaminated site investigation and cleanup. Governor Corzine's Environment Transition Policy Group Final Report, January 2006, recommended, "Make Brownfields Redevelopment A Priority. The Policy Group recommends that the Governor send a strong mandate to his cabinet that Brownfields redevelopment is a priority that requires collaboration..." (View the Final Report at www.connellfoley.com/hselaw/pdf/CorzineEnvPolTransGroupReport.pdf.) On Sept. 7, Governor Corzine released another report, this one entitled Economic Growth Strategy for the State of New Jersey, 2007, which also highlighted the importance of brownfield redevelopment:

In order to encourage the redevelopment of the state's urban centers and other highly developed communities, the state must coordinate its policies and

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resources to foster the redevelopment of brownfields. This redevelopment must include both industrial and mixed-use development. Brownfield properties provide unique opportunities for the state's economy. Usually located where key infrastructure elements are already in place, with access to water, sewer, and utility lines, and proximity to roads, highways, and public transportation, the redevelopment of these properties helps to attract private reinvestment in urban centers, stimulating additional redevelopment, housing, and jobs. Encouraging the redevelopment of these properties requires dealing with a number of obstacles, including liability risk, regulatory uncertainty, difficulty finding financing, and the need for informed community involvement in planning. The state's approach to dealing with these obstacles has become fragmented, with many departments and authorities tasked with similar functions and missions... (Full report available at www.connellfoley.com/hselaw/pdf/egsfinal.pdf)

Against this policy backdrop, several

recent incidents, the origins of which predate this administration, have reminded everyone of the importance of assuring and documenting the health and safety of these sites to people and the environment.

For example, in September 2005, DEP directed the New Jersey Schools Construction Corporation (SCC) to implement measures regarding fill used at the Martin Luther King/Jefferson School site in Trenton. Fill containing recycled concrete aggregate and other materials were deposited on the site, and sampling results revealed hazardous substances in excess of DEP's Residential Direct Contact Soil Cleanup Criteria. Also in 2005, a concern was raised that concrete aggregate, which was recycled from the decommissioning of Ford Motor Company's Edison Assembly Plant and delivered for reuse at other locations, may have contained concentrations of contaminants higher than permitted by regulation for those other sites. Ford developed and maintains a Web site at www.concreteupdate.com to inform the public on progress related to the recycled concrete aggregate. DEP, the State Office of the Attorney General and city and county authorities initiated investigations, orders were issued, and a state grand jury was convened. DEP published new guidance on its Web site for those involved in recycling concrete, entitled Guidance for the Sampling and Analysis of Concrete Designated for Recycling (to view a copy of the guidance documents, visit www.connellfoley.com/hselaw/pdf/concretesampling.pdf).

In another example, it was reported that air sampling in July 2006 at the Kiddie Kollege daycare center in Franklinville, Gloucester County, revealed mercury vapor concentrations in excess of regulatory limits. Reportedly, the Kiddie Kollege operated for two years in a former Accutherm thermometer factory. In August 2006 it was reported that the Ultimate Scholar daycare center and preschool in Toms River, New Jersey, was closed due to high levels of perchloroethylene (PCE), which is a chemical commonly used in dry-cleaning. DEP has already issued a directive to the landlord to conduct the investigation. DEP and the New Jersey Department of Children and Families, which issues child care center licenses, have published interim guidance to license applicants on how to prepare and submit a proper Open Public Records Act (OPRA) request to DEP for information in DEP's files pertaining to any property being contemplated for a daycare facility.

In 2006, concerns were raised about the former Mercer Rubber facility in Hamilton, New Jersey, where residential housing has since been constructed. The New Jersey Department of Health and Senior Services identified excesses of some forms of cancer among residents living near the site, but concluded that there is little evidence that these cancers are a result of environmental exposures. DEP has collected samples from drinking water wells in the area.

These incidents have captured the attention of the public, regulators and the Legislature. New laws, rules and/or resources in these areas will likely result. Finality is an important objective for any new laws, rules and/or resources. The following are some methods being used to help provide finality now and they will continue to be important tools.

Innocent purchasers: DEP recently developed a template Prospective Purchaser Agreement (PPA). By entering into a PPA, DEP provides an innocent purchaser with a covenant not to sue as long as the cleanup gets done by someone. The PPA is to be signed before closing. The PPA requires that the prospective purchaser have an intent to develop the property,

pay a settlement premium to DEP, and certify that the purchaser is an innocent party with respect to site contamination. In return, the prospective purchaser receives a covenant from DEP that DEP will not sue the prospective purchaser under the Spill Act or Water Pollution Control Act for the act of becoming the landowner. If they are qualified, subsequent owners can also sign on to the PPA and receive the benefit of the same covenant not to sue. For a copy of a PPA template which has been previously used by DEP, visit www.connellfoley.com/hselaw/pdf/Prospective%20Purchaser%20Agreement.pdf. Although the PPA template excludes Natural Resource Damages (NRD), the 2005 Spill Act Amendments (A-2444) expanded innocent purchaser liability protection to include protection from liability for NRDs. The template should be revised to reflect at least that change in the law.

Responsible parties: Hercules owned and operated a manufacturing facility in Burlington, New Jersey, from 1947 until 1992. In 1992, Hercules entered into an ACO with DEP for investigation and remediation of the site. In August 2005, Hercules, prospective purchaser Burlington Neck and DEP entered into a new ACO whereby Burlington Neck assumed all responsibility for site investigation and remediation. The new ACO also provided that former owner Hercules would have no further obligations under the 1992 ACO. Shortly thereafter, in September 2005, Burlington Neck closed on the purchase of the site and became the new owner.

Another example of conveying environmental site liabilities from responsible parties, and thereby injecting certainty into the process, is the Hatco site located in Fords, New Jersey. In 1992, DEP and Hatco entered into an ACO for investigation and remediation of the site. Hatco then sued former owner W.R. Grace & Co.-Conn. to participate in the investigation and remediation. In April 2005, Hatco, Grace and Weston entered into a Remediation Agreement whereby, in return for payments by Grace and Hatco, Weston agreed to purchase an insurance policy for, assume liability for, and defend

and indemnify Grace and Hatco for, site investigation and remediation (except for excluded items). In April 2005, DEP, Weston Solutions, Inc. and ACE American Insurance Company entered into an ACO whereby Weston assumed responsibility for site investigation and remediation backed up by a Remediation Expense Containment and Premises Pollution Liability Insurance Policy issued by ACE to Weston. Also in April 2005, DEP, Hatco, Grace and Weston entered into a Natural Resource Damages Settlement Agreement to resolve NRDs. By these three documents, i.e., the new ACO, the Remediation Agreement, and the NRD Settlement, the responsible parties have fulfilled their obligations for site investigation and remediation and can permit other entities to clean up and redevelop the properties

These are examples of how to protect responsible and innocent parties and limit their liabilities to quantifiable, manageable risks to allow a transaction and, thus, redevelopment and reuse to proceed.

Another important factor in brownfields, and other real estate deals, is timing.

Faster cleanups: DEP is working to develop a "scorecard" to formally prioritize contaminated sites for DEP case manager review. Based on DEP's informal description to date of its development of the scorecard, if you want to focus DEP and other state agency resources to move your project, make DEP "love it." Show how your project is consistent with the State Development and Redevelopment Plan, i.e., smart growth. Identify the site capacities and constraints, e.g., sewer, water, utilities, well head protection areas, wetlands, etc. Stress "green" aspects of the project, e.g., open space protection and preservation, alternative energy and energy efficiency, recycling and other waste minimization, greenhouse gas reductions, and innovative technology such as thermal pilings, roof top gardens, etc. Some or all of these can be or are inherent attributes of most brownfield projects and will help get your project the attention it needs to move it forward.

"Brownfield" does not only mean loans, grants or tax credits at DEP. It can mean faster cleanups and liability protec-

tion. The Corzine administration's support of economic growth and environmental protection plays an important role in brownfield development, and in site remediation in general. DEP currently

has mechanisms for liability protection and to provide timeliness of approvals. Further review of these issues by the administration and the Legislature as a result of recent incidents should provide

more tools to redevelop sites to get them off the rolls of active contaminated sites and onto the rolls of safe and healthy, and income-, job- and tax-producing properties. ■