

BROWNFIELDS IN ACTION

by James E. Morris, 1997

On June 10, 1996, then-governor Stephen Merrill signed into law the State's "Brownfields Program," which became effective July 1, 1996. It is now codified in the New Hampshire Statutory Law as RSA Chapter 147-F. The legislation was the product of a collaborative effort among environmental engineers, the State's Department of Environmental Services and Department of Justice, the Business and Industry Association, and private environmentally-concerned organizations.

What are "Brownfields"? And what is the Brownfields Program?

Quite simply Brownfields are properties that have been environmentally contaminated. Since the advent of environmental awareness in the 1970's and 1980's one of the biggest problems associated with contaminated sites was the "strict liability" for cleanup costs that environmental laws imposed on property owners and operators. If a property were found to be contaminated, the then-owner of the property could be held responsible for cleanup costs, regardless of whether that owner had actually caused the contamination; and the same was true for all prior owners of the property, and for any purchasers of the property. Even the bank which had provided the mortgage financing on the property could potentially be held liable for cleanup costs. As a result, if a property was known to be contaminated, or even perceived to be contaminated, no one wanted to have anything to do with it -- the existing owner didn't want to commence cleanup activities, for fear of the unlimited financial exposure; the property couldn't be sold because no one wanted to buy the risk; and no bank would loan any money on the property for fear of its own liability.

This "tar baby" stigma attached not only to vacant parcels, but also to properties that were already developed with existing businesses, and for those that were already developed, thoughts of expansion were out of the question. The dark cloud was so pervasive that even when property owners failed to pay property taxes, municipalities often would not take title to sites thought to be contaminated for fear of their own exposure to liabilities. While various amendments to the original environmental laws had over the years sought to soften some of these effects, by the mid 1990's there still was a dark pall cast across contaminated properties. By 1996 the need for a Brownfields Program was clear.

As the legislature aptly put in its introduction to the Brownfields Program legislation, the strict liability imposed on owners and operators of contaminated property under existing environmental statutes had had the unintended result of discouraging the continued use or further development of contaminated properties, which in turn had fallen into disuse, or were underused, or in many instances were abandoned altogether. The legislature found that it was in the public's best interest to encourage the redevelopment of such contaminated properties. The Brownfields Program was established to provide incentives to encourage the use and development of contaminated sites in New Hampshire.

What does the Brownfields Program do?

Basically the Brownfields Program enables persons interested in purchasing or developing a contaminated site to undertake a cleanup program-- or "remedial action plan"-- for the site without the fear that they are opening up a Pandora's box. An approved Brownfields applicant can conduct a site investigation without fear of being liable for preexisting contamination, or for additional contamination or increased environmental harm caused during the site investigation (unless the harm is attributed to the person's own negligent or reckless conduct). More significantly, when an approved remedial action plan is developed for the site the State Department of Justice will issue a formal document indicating that it will not sue. After completion of the remedial action plan this "covenant not to sue" stays with the property and applies to all new owners. Protection is even afforded even to those who initially enter into the Program, but later decide to withdraw, even where a remedial action plan is not developed at all, or, if started, is not completed.

Who is Eligible?

The Brownfields Program is open to existing landowners, as well as prospective purchasers and developers, so long as the applicant has not caused or contributed to the current site contamination. While this "innocent-status" qualification might limit Program eligibility for many existing landowners (who may have caused or contributed to the contamination in question), the site itself is not permanently "blackballed" because it is capable of being eligible for participation in the hands of a new owner. One of the most noteworthy aspects of the Brownfields Program is that it is open to prospective purchasers of contaminated sites.

The Brownfields Program is administered by the State Department of Environmental Services ("DES"). DES has developed an application form, and there is a non-refundable application fee of \$500. Gary Lynn, P.E., who holds the title of "Brownfields Coordinator" at DES, says that applications to participate in the Brownfields Program are processed quickly and a determination of eligibility or non-eligibility is made within 30 days. According to Mr. Lynn, of the total number of applications submitted to date, only one was found to be ineligible, and that particular application was later re-submitted, and found to be eligible. There are presently 10 active Brownfields Program sites in the state, and one of those is just about finished.

No Stampede Yet.

With what appears to be a win-win situation for everyone, the obvious question is, why aren't there more participating sites? The answer is, although the Brownfields Program goes a long way toward relieving the fear of unlimited liability, it does not provide the financing for the cleanup. The application, site investigation, and implementation of the remedial action plan must still be financed by the owner or developer of the property, with its own funds, or with mortgage financing. Although mortgage lenders now can look upon such properties without seeing the spectre of unlimited liability for cleanup costs, they must still look at the overall financial viability of the property and the project in question. As the New Hampshire real estate

market continues to rebound from the catastrophic downslide it experienced in the late 80's and early 90's, it can be expected that development of many more contaminated or perceived-contaminated properties through the Brownfields Program will become more financially attractive.

Financial Incentives.

The U.S. Congress has recently provided a limited financial advantage for the cleanup of contaminated properties in certain designated areas. The Tax Relief Act of 1997 has made it possible for the owners of contaminated properties in a "targeted area" to elect tax-deductible treatment of cleanup expenses in the year incurred. Generally, and without such relief, expenses incurred for environmental cleanup are classified for tax purposes as capital costs. The election is only available for a limited time, for cleanup expenses incurred before January 1, 2001. "Targeted areas" include high poverty areas and federally designated empowerment zones and enterprise communities, of which there are few in New Hampshire. However, certain contaminated areas in Durham, Manchester, Concord, and Nashua, are eligible for the favorable tax treatment, and DES's Lynn is hopeful that he will see Brownfields Program applications from property owners or potential developers in those areas.

Mr. Lynn also indicated that the State has applied for a Federal Grant of \$200,000 to establish a state-wide pilot program to study how municipalities can make contaminated sites which have high tax arrearages, or which have been forfeited for non-payment of taxes, more attractive for development, so that they can be placed back on the tax rolls.

The Brownfields Program has opened the door to revitalizing contaminated properties, allowing them to participate fully in the State's economic growth as we head into the next century.