Brownfield Redevelopment in Tennessee

DAVID C. HIGNEY
GRANT KONVALINKA & HARRISON PC
(423) 756-8400
dhigney@gkhpc.com

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Brownfields Definition

“Real Property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”

Liability Scheme

The owner of contaminated property is responsible for its cleanup based solely on ownership status.
Begin by thinking about Federal Law

- Resource Conservation & Recovery Act (RCRA)
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or “Superfund”)
RCRA

- Permitted Hazardous Waste Sites
- Example: Atlantic Steel in Atlanta
  - RCRA Post Closure Permit
- Atlantic Station
CERCLA Liability Scheme

Who is liable (responsible) to perform or pay for a site cleanup?

- OWNER/OPERATOR of Facility
- OWNER/OPERATOR at time the disposal occurs
- GENERATORS (arranged/treated)
- TRANSPORTERS
CERCLA Liability

Three key facets:

- **Strict Liability**
  - Liability without regard to Negligence or Bad Faith.

- **Joint and Several Liability**
  - Parties may be held liable for the entire cost of clean-up, without regard to their share of the waste or responsibility.

- **Retroactive Liability**
  - Liability extends to the beginning of time (i.e. prior to the passage of environmental statutes).
CERCLA Liability Protections

- Act of God
- Act of War
- “Innocent Landowner” Defense
  and
- Bona Fide Prospective Purchasers (BFPPs)
Innocent Landowners

- Purchasers Who Acquire Property *Without Knowledge of the Contamination* (may assist pre-2002 land owners);

- Involuntary Transfers to Government
  - by eminent domain
  - by condemnation

- Inheritors
Bona Fide Prospective Purchasers

- Owner/Operator Who Acquires Property after January 11, 2002 and
  - Performs “All Appropriate Inquiry”
  - Has No Affiliation with the Liable Party
  - Exemption Applies Even if Property is Contaminated (But beware . . .)
Bona Fide Prospective Purchasers Must Satisfy the Following Obligations:

- Comply with Land Use Restrictions and Not Impede Institutional Controls or Response Actions
- Take Reasonable Steps to Prevent Releases
- Provide Cooperation and Access
- Comply with Information Requests
- Provide Legally Required Notices
AAI Rule Requires... 10 Criteria

- Inquiry by Environmental Professional
- Interviews with past/present owners or operators
- Review of historical sources
- Searches for recorded environmental cleanup liens
- Review of government records
- Visual inspection of facility/adjoining properties
- Specialized knowledge of buyer
AAI Rule Requires... 10 Criteria

- Relationship between purchase price/value of property
- Commonly known/reasonably ascertainable information regarding the property
- Degree of obviousness of contamination

http://www.epa.gov/brownfields/aai/aaigg.htm
AAI Compliance

- Hire a reputable consultant
- Perform Phase I Environmental Site Assessment in accordance with revised ASTM 1527-13 standard (*new changes*)
- Phase I must be performed *pre-closing*
- Phase I only good for 1 year
- Phase I required to be updated after 6 months
Brownfield Initiatives

- **T.C.A. §68-212-224** authorizes Brownfield Agreements
Potential Brownfields

- Abandoned and former gas stations
- Former dry cleaners
- Old factories
- Former coal yards
- Former junk yards
- Legacy contamination of unknown origin
- Urban parcels
Potential Brownfields

- Sites where “no further action” (NFA) letter simply is not enough comfort or assurance because additional information could come to regulator’s attention and “re-open” the conditional closure provided by NFA letter

- National Priorities List sites (listed/proposed) are not eligible for Brownfield Agreement unless EPA consents
The Benefits of Brownfields Revitalization

- Protects Public Health & Environment
- Recycles prime real estate into productivity
- Reuses existing infrastructure; encourages infill
- Leverages public investments or grants
- Creates Jobs
- Deters urban sprawl and carbon emissions
- Fosters Environmental Justice
Consider State & Local Laws or Policies, Also

- Lender Liability – certain statutory protections; *not* impacted directly by AAI or BFPP requirements
- Meeting otherwise applicable statutory criteria
- National Contingency Plan compliance for removals
- Active vs Inactive Sites; Petroleum site assignments
- Municipal Consent Decrees with EPA
- Ordinances - Zoning, Land disturbances
- Permit Requirements – runoff, discharges to POTW
VOAP is Tennessee’s Response Program within TDEC’s Division of Remediation

- Program participants commit to take certain actions or address an issue in a certain way (restrictions, removals, etc.) at eligible sites.

- Program participants receive intervention and enforcement protection from TDEC programs (not EPA) at eligible sites for those items identified and addressed in the agreement.

VOAP allows parties to work proactively to address necessary cleanup of a property to return it to productive use as safe for its next intended use.
Voluntary Clean Up Oversight and Assistance Program (VOAP)

- Early Determination of Reuse
  - Allows for a Focused Investigation that considers the anticipated reuse or construction activity
  - Interim Actions can be conducted as issues are encountered
  - Operations & Maintenance (O&M) Plans or other institutional controls can be designed to fit reuse
  - Accelerates return of property to productive use
Involved Parties For Your Brownfield Site

- TDEC – Nashville Central Office
- TDEC – Local Field Office regulator
- Lenders
- Public Officials (politicians)
- Civil Servants
- Attorneys
- Consultants
- Engineers
- Vendors
State Voluntary Program

- Participants contract to receive a *No Further Action* letter and a release of liability for matters addressed in the agreement – the areas where investigation and/or cleanup is conducted.

- The Department can:
  
  - Resolve potential liability for an Innocent Landowner or Bona Fide Prospective Purchaser at a contaminated site (DO YOUR DUE DILIGENCE)
  
  - Establish a legal basis for enforcement of engineering and institutional controls to limit future liability at a site.
Brownfield Documents Framework

- Management Review Committee (MRC) Application
- Legal Documents
  - Consent Order – Voluntary Agreement may not be employed by a person who generated, transported or released contamination; or,
  - Voluntary (Brownfield) Agreement – Only available to an Innocent Party
- Public Notices
- Notice of Land Use Restrictions
- Fees & Invoices
Parts of the Brownfield Agreement

- Identification and Documentation of Cleanup
  - Who, What and Where
  - Legal distinctions + descriptions matter (entities, parcels)

- Summary Description of all known environmental investigations, studies or reports, including:
  - Title and Date
  - Authors (or producing party)
  - Conclusions or results of each investigation or study
  - Recommendations for remedial measures or other information material to a decision for TDEC to execute an Agreement
Parts of the Brownfield Agreement

- The Parties agree to the following:
  - Fee schedule
    - Not inclusive of drafting costs, public notice/newspaper costs, recording fees for land use restrictions, or unusual costs of TDEC for oversight
    - Not as Flexible; Invoices are more regularly issued for sites
  - Public Notice and Public Input requirements
    - Statutory mandates
  - Plan or Outline of the environmental conditions to be investigated, remediated, addressed and monitored
    - Often negotiated with TDEC after review of Site plans, conditions and investigations
Parts of the Agreement

- **Agreed Liability Relief**
  - Varies depending upon the specifics of the Site
  - Can extend to “Successor Parties” – successors in interest or title

- **Agreed Actions to be Taken**
  - The Voluntary Party agrees to certain investigations, clean up and monitoring
  - To qualify for contribution protection, Voluntary Party agrees to send written notification by certified mail to all local governments having jurisdiction over any part of the subject property and to all owners of adjoining properties.
    - Public Notice – newspaper of general circulation
      - Notice of Approved Administrative Settlement Pursuant to 42 U.S.C. § 9613(f) with Respect to the Property
      - Site development and use restrictions
      - Contact Information
Parts of the Brownfield Agreement

- Land Use Restrictions are typically required. Examples:
  
  - The Voluntary Party agrees that the property will be restricted as follows: [negotiated]. Parties can put limits or conditions on site uses, groundwater, soil intrusion, fill, grading, construction, excavation, or engineered barriers.
  
  - The Voluntary Party agrees that it will file any land use restriction identified as necessary by TDEC.
  
  - Required as part of the remedy where exposures do not meet Residential Screening Standards.
  
  - Varies depending upon the specifics of the Site
Parts of the Agreement

- As a Volunteer Party the following *continuing* obligations apply:
  - Comply with or enforce land use restrictions
  - Do not impede effectiveness or integrity of institutional controls
  - Provide cooperation, assistance and access
  - Comply with information requests and subpoenas relative to environmental conditions at the property
  - Meet the standards that would apply if permits were required.

- Control of vapor intrusion is often an issue. *Vapor Intrusion* is undergoing renewed, nationwide comment and rulemaking.
Notice of Land Use Restrictions

- Filed with Register of Deeds
  - Becomes part of the Chain of Title
  - Runs with the Land; remains effective upon transfer

- Location of Contamination
  - Identify the location of the area(s) of potential environmental concern.
  - In addition, identify generally the type, location, and quantity of hazardous substances known to exist on the site.

- Land Use Restrictions
  - Identify specific restrictions on the current or future uses of activities allowed at the site
Notice of Land Use Restrictions

- Enforcement
  - Any owner or any unit of local government having jurisdiction may enforce a Land Use Restriction by means of a civil action.
  - The Commissioner may enforce the Land Use Restriction through the issuance of an Administrative Order or by means of a civil action.
  - T.C.A. § 68-212-213, provides for a civil penalty against any person who fails, neglects or refuses to comply with a Land Use Restriction
Notice of Land Use Restrictions

- **Term**
  - The Land Use Restriction shall run with and bind the Property until restrictions shall be made less stringent or cancelled.
  - Can be cancelled or made less restrictive/less stringent where risk is demonstrated to have been eliminated or controlled *and* reducing land use restrictions remains protective of human health and environment.
  - Changes require public notice and comment opportunity. TDEC must send written notice (w/ assistance of the requesting party) by certified, return receipt mail to all local governments having jurisdiction over any part of subject property and all owners of adjoining property.
Problem Areas & Takeaways

- Organize and plan timing, schedules with entire team
- Understand what protections are wanted and which ones are needed, and make transparent and unambiguous action commitments
- Comply with land use restriction notice obligations; actual conditions and requirements; and convey Site subject to those
- Finance Planning
- Legal & Regulatory Changes
  - Case law changes
  - Changes in Guidance interpretations
  - Rulemakings (Vapor Intrusion; ASTM stds.; AAI policy)
QUESTIONS

David C. Higney
Grant, Konvalinka & Harrison, P.C.
633 Chestnut Street, Suite 900
Chattanooga, TN 37450
(423) 756-8400
dhigney@gkhpc.com