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GEORGIA BROWNFIELDS

Prior to the passage of the **Small Business Liability Relief and Brownfield Revitalization Act** (a.k.a. the '**Brownfields**' Act), developers would typically steer clear of environmentally impacted properties. The risk and uncertainty associated with such properties often outweighed the benefit of property ownership. People would prefer to buy the "clean" property down the way, rather than taking unneeded risk of a more desirable location. However, in densely populated areas, large "clean" properties may be difficult to find. In some areas, contaminated properties may be all that remain for the developer trying to take advantage of the now popular mixed-use developments and in town residential developments, not to mention the common commercial developer. The Brownfields Act has helped make ownership of environmentally impacted properties more feasible, which has also helped make productive use of unused and/or depreciated land. In turn, this is creating jobs for our local markets.

What is a Brownfields site?

Per the Act, a Brownfields Site means "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." Based on information provided by the United States Environmental Protection Agency (EPA), anywhere from 500,000 to a million Brownfields Sites exist across our country.

Who regulates Brownfields sites?

EPA originally developed the Brownfields Initiative in 1995, looking for methods, procedures, or legal processes to encourage development of contaminated properties. Since its inception, various amendments have been made, ultimately providing greater protections to future owners of Brownfields properties. The most significant change was the passage of the Brownfields Act (Act) on January 11, 2002, which provided liability protection for prospective purchasers, contiguous property owners, and innocent landowners. This Act also authorized increased funding for state and local programs that assess and clean up Brownfields. For additional information on Federal Brownfields regulations visit <http://www.epa.gov/brownfields/>.

Since the passage of the Act, approximately 40 states have developed their own voluntary Brownfields Programs (BFP) to fit their area. Generally, these programs are more responsive, provide for broader protections, and are generally cleaning sites quicker and more effectively. However, all state Brownfields Programs vary. Variations include the application fees, application details, investigations needed to define the environmental conditions present at the Brownfields site, clean up requirements, as well as the actual Limitation of Liability (LoL) benefits.

On July 1, 1996 Georgia made effective the Hazardous Site Reuse and Redevelopment Act (HSRRA), which provided limitation of liability benefits mainly for Hazardous Site Inventory (HSI) facilities or state Superfund sites. The HSRRA was amended on numerous occasions,

which has included amendments in July 2002 and recently in July 2005 with Senate Bill 277. The 2005 amendment provides protections for properties with “preexisting releases” including non-HSI properties and properties with petroleum releases. The protections for petroleum were made available for releases from Underground Storage Tank Management Program (USTMP) sites, which has helped make one of the most commonly contaminated facilities more marketable for redevelopment. For additional information on Georgia Brownfields regulations visit <http://www.gaepd.org/Documents/brownfields.html>.

What are the Benefits of a Prospective Purchaser receiving a Georgia Brownfields Limitation of Liability?

As indicated above, state LoL benefits vary. The state of Georgia provides three primary benefits with their issuance of a LoL to a Prospective Purchaser (PP). The LoL provides protections from:

- Groundwater impacts
- Third party liability
- Regulatory changes

Although these benefits may seem minimal to some, anyone previously involved with environmentally impacted properties knows that groundwater remediation can be **very** expensive. Groundwater remediation projects rarely cost less than six figures, and often extend near and into the seven-figure range and take years to complete. Further, the third party liability protections could serve to be as substantial. Finally, the exception from regulatory changes removes substantial uncertainty for the remedial process—closing sites from future regulatory actions for the pre-existing releases.

An added benefit of a Georgia LoL through the BFP is the tax incentives, as outlined in House Bill 531 (HB 531). Generally, this Bill permits the PP to freeze the tax value of the property at the lesser of the acquisition cost or the fair market value at the time of the Brownfields Application and deduct the costs associated with receiving the LoL (excluding legal fees, and other items) to the tax bill at the current fair market value of the property for an approximate period of 10 years or until the expended costs are reached. This Bill can help re-coupe the costs for the remedial actions required to receive the LoL.

What does this mean for the Consultants?

The process for a PP receiving a LoL on a Brownfields site involves providing information on environmental conditions at a site. This will often times require a Phase I Environmental Assessment and Phase II Environmental Assessment, at a minimum. Again, state requirements vary and these variations can be significant. Consultants should be aware of the requirements within the states where their services are being provided. Georgia requirements are more involved than some other states, requiring detailed environmental assessments. Some states may only require a Phase I Environmental Assessment and limited analytical testing data. Also within Georgia, the process varies for regulated and voluntary sites (i.e. HSI or state Superfund sites vs. non-HSI facilities).

In Georgia, detailed environmental assessments are required to fully characterize the conditions present on a Georgia Brownfields site. First the PP and the property itself must qualify for LoL protections. Historic information must be presented. A full definition of the soil and groundwater conditions at the Brownfields site must be made. If soil impacts are present above the appropriate Risk Reduction Standards (RRS), either residential or commercial, or source materials are present, remedial actions are needed. However, since the LoL provides protections for groundwater impacts, the PP does not need to remediate groundwater just characterize the conditions for protection.

The Georgia Brownfields process is a multi-step process. The number of steps required is generally dependant on the result of each subsequent step. Typically a prospective purchaser corrective action plan (PPCAP) is initially submitted to the Environmental Protection Division (EPD) along with a non-refundable application review fee of \$3,000.00—as the Brownfields Application (Application). The PPCAP clarifies the conditions that qualify the property and the purchaser for the program and its protections. It also provides specific plans to define the soil and groundwater conditions across the entire property, groundwater flow, remediation for soils with concentrations greater than the appropriate RRSs, possible gas venting, and management of impacted materials during site construction. The EPD must respond to the PPCAP with a conditional LoL letter, contingent on completing the items in the PPCAP, before the property transaction is completed by the PP (prior to closing).

The PPCAP is then implemented and the conditions resulting from the actions outlined in the PPCAP are documented in a prospective purchaser compliance status report (PPCSR). The PPCSR is a very detailed report that defines the final conditions at the Brownfields property, documents the soil remedial actions conducted, restates the property and purchasers' qualifications, and certifies that the soils at the Project Site meet the appropriate RRSs. With the EPDs review and concurrence that the PPCSR is complete, the final LoL will be issued by the state and the PP receives the LoL benefits outlined above. In the event that remediation is not required at a property, or full remediation and site characterization has already been completed, a PPCAP would not be needed and a PPCSR could be submitted with the fee as the Application.

Consultants need to be fully aware of the Brownfields requirements and the limitation of that Program. Final LoLs are only as good as those conditions investigated. If the consultant does not test for a certain compound, and that compound is later detected, the LoL does not provide

protections for those conditions and the PP could be held liable. This also provides liability for consultants themselves, as sound recommendations must be made for the constituents of concern (COC) at a Brownfields site. Ultimately, to assure proper LoL protection, it is the responsibility of the PP to hire consultants and environmental legal council adequate for the service and knowledgeable of the processes.

References:

<http://www.epa.gov/brownfields/>

<http://www.gaepd.org/Documents/brownfields.html>

Georgia Code Article 1. General Provisions Regarding Ad Velorem Taxation of Property, so as to Provide for Preferential Assessment of Environmentally Contaminated Property, House Bill 531.

Georgia Hazardous Waste Management Act, Article 9. Georgia Hazardous Site Reuse and Redevelopment Act, Senate Bill 277.

Photo 1 – A & E Drum HSI

Photo 2 – Ellsworth HSI

Photo 3 – Wireburn HSI