NEW BROWNFIELDS INCENTIVES ADD TO DIMINISHING INVENTORY OF DEVELOPABLE SITES IN SOUTH FLORIDA

By Michael R. Goldstein

ABOUT THE AUTHOR
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All of the empirical evidence available to close observers of the brownfields marketplace points to this: the scarcity of land combined with the demand for land set against the backdrop of a maturing regulatory approach to contaminated property means that anyone involved with development needs to take brownfields redevelopment seriously and make it a viable part of their business strategy. Those that fail to do so will forego a competitive advantage and forfeit opportunity to industry peers and rivals.

This admonition not only holds true for the private sector, where the coin of the realm is the conventionally commercial transaction and where vertical or horizontal development is contemplated, but also equally the case for communities where local governments distinguish themselves, and market quality of life, with and through the number and design of their conservation and open space amenities which may not involve any construction at all.

Given the amounts of money, the sweeping and innovative array of regulatory initiatives, and the comprehensive types of liability protection vehicles now being made available at all levels of government, cleanup, and reuse and redevelopment of contaminated lands are no longer esoteric, opportunistic adventures for the abnormally, precociously risk tolerant but strategic and long term plays for both the traditional development community and the highly risk averse local government community.

The purpose of this article then is threefold. First, it is written to provide a sense for how successful the Florida brownfields program has become in just under six years. Second, to provide a broad overview of the tangible benefits that are now available to underwrite the cost of brownfields cleanup and facilitate redevelopment by making the process more predictable, more certain, and less risky and costly. Finally, to provide a step-by-step strategy for actually obtaining a brownfield designation such that a given project can take advantage of the many incentives that currently exist as well as that are likely to be created over the next several years.

A RAPIDLY MATURING ENVIRONMENT IN FLORIDA FOR BROWNFIELDS

The idea of utilizing market incentives to encourage the private sector to invest in and clean up contaminated lands is so simple and elegant that it has to qualify as one of the most important regulatory initiatives of the last fifty years. Although originally coming out of the federal government during the first term of the Clinton Administration, the Brownfields approach to redevelopment has spread spectacularly throughout the country, and just about every state in the union now has a viable and vigorous revitalization program, with Florida leading the way in many respects.

In 2002, the Florida Brownfields Program exhibited a surge in interest and activity. Twelve local governments throughout the State designated eighteen new brownfield areas in counties and municipalities, bringing the total number to sixty-three and encompassing almost 69,000 acres of land. Seventeen Brownfield Site Rehabilitation Agreements or "BSRAs" were entered into in 2002 for a total of thirty-two the inception of the program in 1997. Six "No Further Action Orders" were issued by the Florida Department of Environmental Protection this year. From 1998 through 2002, the State's Voluntary Cleanup Tax Credit program issued a total of just over $850,000 in tax credits. Last year, the amount applied for exceeded $1.125 million, with over 87% of that claimed for brownfield sites alone. According to Office of Tourism Trade and Economic Development figures, over $26.5 million of new capital investment was directly attributable to redevelopment of old brownfield sites in 2002. These are all impressive statistics, which will likely continue to trend in the right direction.

Closer to home, in South Florida last year there were three broad areas designated as brownfields, two on behalf of local governments and one on behalf a private developer. In March, the City of Lauderhill designated 504 acres of land in the U.S. 441/State Road 7 corridor. In September, the City of Hollywood designated 148 acres in the Liberia/Oakwood Hills area. Finally, in December, a private developer designated a twelve-acre former landfill in the City of North Miami Beach and plans to build a grocery anchored retail center which is expected to create in the aggregate almost 400 jobs.

This activity builds on what has been historically strong participation by South Florida in the Brownfields program. In March of 1998, the City of Miami was only the second local government ever to designate a brownfield area, an impressive 3,932 acres of underutilized and partially blighted land ripe for cleanup, redevelopment, and job creation. Opa-Locka, an area where many believe we'll see significant investor interest over the next several years, followed shortly thereafter, designating 1,286 acres in February of 1999. Miami-Dade County got into the brownfields market in dramatic fashion in July of 1999, designating over 33,000 acres. Pompano Beach, Miramar, Lauderdale Lakes, the City of Miami Beach, Dania Beach, and West Palm Beach round out the class of South Florida communities paving the way for private and public sector parties willing to tackle the many issues associated with brownfield sites.

THE INVISIBLE HAND: THE BROWNFIELDS INCENTIVES TOOL BOX

Here in South Florida, with land at a premium and large parcels of developable property simply not available, a strategy that involves the identification, remediation, and reuse of polluted property provides significant new opportunity for commercial, retail, residential and mixed use projects. The number and variety of success stories across the state is compelling, and we are seeing in Broward, Miami-Dade, and Palm Beach Counties a healthy mix of local, regional, and even national development firms aggressively compete for the rights to purchase old gas stations, dry cleaners, factories, nurseries, and landfills (especially landfills), environmental blemishes included.

Notwithstanding all of the activity, excitement, and progress being made with and on brownfield sites, many sophisticated actors in the real estate market remain in the dark as to the benefits associated with such an undertaking and, critically, the process required to have a site formally obtain brownfield status. While a complete briefing on these issues is beyond the scope of this article, we address four of the more basic building blocks to an integrated brownfields strategy: liability protection, risk based corrective action, financial incentives, and the brownfields designation process itself. The balance of this article focuses on the first three elements, while Part II discusses in detail what it takes to get contaminated property formally designated a brownfield and then eligible for a host of regulatory and financial incentives.

Liability Protection. Provided that a developer successfully obtains a local government resolution designating a site a brownfield and enters into what is called a Brownfields Site Rehabilitation Agreement or "BSRA." the State will provide the developer and its lender with comprehensive liability protection under State law against suits in cost recovery and to compel more cleanup than what is initially agreed to with the FDEP or, more likely in South Florida, a delegated local pollution control program such as Miami-Dade County DERM or Broward County DPEP. This helps to ensure that cleanup cost estimates you receive from a contractor stay relatively fixed. While there remains some level of exposure under federal law with respect to private third parties and under state law with respect to property damage and personal injury, thorough pre-acquisition due diligence along with an environmental insurance policy creates a comprehensive risk management strategy to address even the most complicated liability scenarios.

Risk Based Corrective Action. Obtaining the brownfields designation and entering into the BSRA also facilitates the use of Risk Based Corrective Action or "RBCA" as a cleanup strategy. RBCA is a relatively recent regulatory initiative which tailors the amount of cleanup required by the State to the actual risk posed by the reuse. In other words, where a redevelopment project involves, for example, the construction of a big box retailer with acres of parking, a remediation plan that calls for leaving contamination safely encapsulated in plan can be approved. The justification for such an approach is that by effectively capping the site with concrete and asphalt, you have removed the risk of exposure of humans to contaminated soil. If, on the other hand, you were going to reuse this same site as a park with open space and playground facilities, the risk of exposure would be high, and excavation and removal of the contaminated soil would likely be required. As a general proposition and due to the dynamic nature of the redevelopment process, sites that are in the brownfields program are uniquely positioned to take advantage of the flexibility—and high cost savings—that RBCA provides.

Financial Incentives. In 100% of the sites that I have worked on for both private and public sector clients, the first question is always the same: "How much money is available for our project and how do we get it?" The list of funding sources is long, creative, and expanding, and a full catalogue is not possible in this space. That said, the first answer is this. Financial incentives come in the following forms: tax credits, tax refunds, low interest loans, loan guarantees, and grants. For private sector projects, the first four categories are directly available. By and large, significant grant dollars are available only to local governments and certain eligible non-profit entities but only on a highly competitive and somewhat attenuated and convoluted basis. This money - up to $1 million in grant funding for eligible applicants - is accessible but requires skilled assistance during the application process.

In terms of funding available directly to the private sector, there are two incentive programs that can be lucrative and are fairly easy to understand and apply for. The first is the Voluntary Cleanup Tax Credit, referred to above. This program provides a tax credit of 35% of every dollar spent on assessment and cleanup activities up to $250,000 per site per year. In the final year of cleanup, the state provides a "kicker" of 10% of the total cost of cleanup up to $50,000 in tax credits.

The math here adds up very quickly. Take the following example: Cleanup of an abandoned strip mall with two heavily contaminated former drycleaner tenants is estimated to cost $1.5 million and take three years. In year one, a major soil removal action takes place and $750,000 is spent. In year two, groundwater contamination commences at a cost of $500,000. In year three, the final year of the cleanup, the remaining $250,000 is spent. Applying the 35% factor to the first year cleanup costs yields $262,500, however, that number exceeds the cap, and the total tax credit is thus limited to $250,000. In year two, 35% of the cleanup costs amounts to $175,000. Finally, in year three, the applicant would be entitled to a tax credit of 35% of $250,000 - or $87,500 - as well as the kicker, 10% of the entire cost of cleanup capped at $50,000. Here, 10% of $1.5 million is $150,000, so the kicker would in fact be limited to $50,000. The total award over three years comes to $562,500 or an effective rate of 37.5%.

It's important to note that this is a tax credit that can only be used against personal intangible property tax or corporate income tax. That said, the credits are freely transferable once as of right. So even if the applicant doesn't have any qualified tax liability, such as would be the case for a local government, they can still be sold for value on the secondary market or transferred to an end user as a further inducement to build and create jobs in disadvantaged areas.

The other major incentive readily available for private sector developers is the Brownfield Job Program which is designed to reward job creation on brownfield sites. Provided that an applicant meets the eligibility criteria, which includes at least $2 million in fixed capital investment and the creation of at least 10 new jobs, the applicant is entitled to an award of $2,500 per job created. This is a cash tax refund - not a credit - against a broad array of tax obligations as set forth in Florida Statutes.

Where the reuse - such as a large retailer - is likely to create large numbers of jobs, the award can be quite significant. As just one example, most large grocery stores and big box retailers create on the average between 300 and 500 new jobs. If we use the above scenario, the abandoned strip mail, and assume that the end user will produce 400 new positions as an example, the total award for job creation would be $1.25 million.

Several caveats are important here. First, the award is paid out in equal installments over four years. Second, it's a one time award based on the number of full time equivalent jobs slots created. Third, an applicant must have as much tax obligation as potential tax refund in order to obtain the entire refund. And fourth, the program provides for a local government match of 20% - or $500 per job - which, in most instances, is unlikely given today's budgetary constraints. Thankfully, the law was recently amended to allow local governments to opt out of their share and still provide applicants with an opportunity to obtain the balance - $2,000 per job - from the State. Using the same example as before - 400 jobs - the award then becomes $800,000, still very significant. If you now couple that amount with the Voluntary Cleanup Tax Credit discussed above, the total financial package for such a project would come to approximately $1.3 million, an amount that almost completely subsidizes the original $1.5 million cost of cleanup.

UNLOCKING A SECOND MARKET FOR DEVELOPABLE SITES IN SOUTH FLORIDA

To fully appreciate the significance, utility, and potential return on a brownfields site, it is important to become familiar with the incentives that such a status can confer on a project. The foregoing discussion provides some insight into how powerful those incentives can be - and integral to structuring and consummating a redevelopment project involving contaminated lands. While the financial incentives are important and can be considerable, it's important to keep in mind that the most significant benefit to be derived by a brownfields strategy is the ability to access the intrinsic redevelopment potential locked up in the contaminated land itself by virtue of the environmental conditions and associated regulatory uncertainty. This is especially so in South Florida where a rapidly diminishing inventory of developable sites makes the brownfields marketplace a viable and attractive alternative and places a premium on underutilized property irrespective of its status as impacted and subject to the costs and vagaries historically arising out of the cleanup process.