

“CONGRESS COMPLICATES BROWNFIELD OWNERSHIP”

By: Joseph Quandt*

Manifesting the demise of Tantalus (its reach exceeding its grasp), Congress has once again taken a matter which should have been simple and straightforward and created what will certainly become a regulatory quagmire. The quagmire's name is the Small Business Liability Relief and Brownfield's Revitalization Act.

The intent of the Act appears to be to provide for additional funding for Brownfield redevelopment as well as for some liability relief for small businesses. Unfortunately, in the efforts to achieve bi-partisan support, so many other elements were added that the legislation creates more uncertainty for individuals who wish to redevelop Brownfield properties.

Although Brownfields have a very specific definition under the above referenced legislation, they can loosely be defined as properties which, through previous use, have become contaminated with hazardous substances. The new Act (effective January 11, 2002) does provide some help through funding mechanisms. It more than doubles the amount of federal funds available for use in identifying, assessing and remediating contaminated properties. It also helps to codify some of the numerous EPA policies related to “enforcement discretion” issues. Unfortunately, if it was Congress' intent to create greater incentive for property owners to purchase Brownfields rather than locating in Greenfield areas (areas which are uncontaminated), they have fallen short of their goal in many ways.

First, the new Act makes it more difficult to qualify for the “innocent landowner defense” under CERCLA, the federal environmental clean up law. This defense essentially held that if a landowner acquired a piece of property without knowledge of the contamination and after exercising some level of environmental due diligence prior to the purchase (based upon the purchaser's level of sophistication), the landowner was not held responsible for the contamination on the property. The new Act now requires that innocent landowners stop or prevent ongoing or future releases of contaminants, cooperate fully in the performance of environmental clean ups and comply with other restrictions which the government may establish. As in most cases with matters legal, the demons are in the details. Preventing ongoing or future releases could be interpreted as a requirement for “innocent” landowners to install a groundwater treatment system to prevent the further spreading or migration of contamination. Fully cooperating in the performance of environmental clean ups probably will mean providing state and federal environmental authorities unfettered discretion and access to the property at all times including the right to suspend business operations if necessary or convenient.

Second, the EPA previously had a policy which allowed purchasers of Brownfields to enter into prospective purchaser agreements with the EPA. These agreements would allow prospective purchasers to agree, in a contractual sense, with EPA exactly what the purchaser's responsibilities would be with respect to the ongoing ownership of contaminated property. The new Act attempts to codify this policy but creates so many hurdles that the protections are unworkable. Among these new requirements is once again the new requirement to prevent ongoing releases and prevent future releases, provide unfettered access for governmental authorities and comply with any additional restrictions which the government may mandate. Most troublesome, it establishes a condition upon which the government may establish a lien on the property for any increased value which was experienced as a result of the government's environmental actions. Exactly how the lien would be calculated and

enforced is somewhat vague. These conditions and caveats will most certainly create a regulatory environment where it will be better to pursue prospective purchaser agreements rather than relying upon the new Act for protection.

Third, the new Act creates conditions for liability exemption related to migrating contamination. A person subject to these conditions is generally an individual who purchases property which is not the source area of contamination but has contaminated groundwater, etc. as a result of contaminants which are migrating from an adjoining property. Previous law and policy provided an exemption to liability for individuals who have migrating contaminants on their property so long as they had no role in the contamination and they do nothing to exacerbate the contaminating conditions. Liability exemption for migration under the new Act now requires that the owner of property on which contamination has migrated demonstrate that they have taken reasonable steps to prevent an ongoing release and prevent future releases of hazardous substances. These owners must also demonstrate that they have completely cooperated with governmental authorities in environmental response activities to qualify for this exemption. Just as troubling, the new legislation places similar restrictions and conditions for liability exemption for property lessees and easement holders, two parties who were previously not liable in most circumstances.

Investing in contaminated property has always been complicated and somewhat risky. Legislative efforts over the last five years have helped in redeveloping our industrial core by encouraging initiatives which would create a much clearer boundary between liability and non-liability. This new legislation, when coupled with the uncertainty of liability management under Michigan's environmental programs will create further reticence on the part of many purchasers to take the risk of redeveloping prior industrial property. These uncertainties will cause new and expanding businesses to look outside Brownfield opportunities into Greenfield areas thus creating urban sprawl, another negative result. Individuals interested in investing in Brownfield property would be well advised to step very carefully through the environmental due diligence process to avoid unwanted environmental clean up responsibilities.

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