

“Money for Nothing... And Other Opportunities in Brownfields Re-Development”

By Michael P. Carvalho, Esq.[^]

Well, alright, maybe it isn't exactly money for *nothing* but how does up to \$1 million dollars at 3% interest for a ten-year term or longer sound? For the past several years, many enlightened Developers have been extolling the hidden virtues of re-developing environmentally challenged properties (commonly referred to as “Brownfields”). EPA defines Brownfields as 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. According to EPA, “cleaning up and reinvesting in these properties takes development pressures off of undeveloped, open land, and both improves and protects the environment.” Through various state grants and loan subsidies, EPA is actively promoting Brownfields re-development projects. Given the breadth of the definition proffered by the federal government many commercial properties may qualify for low interest loans and favorable tax treatment that is making environmentally impaired properties more attractive than ever.

First, a word of warning: Brownfields properties, in and of themselves, are not “magical” and the traditional tests for investment (e.g. location, location, location, etc.) still apply. Yet, for those sites that have been passed over “but for” the concerns associated with environmental legal liability and costly environmental cleanup, Brownfields re-development projects are rapidly becoming manageable.

Recently, I had the good fortune to assist a client with the redevelopment of a former railroad site in Charlottesville, Virginia. The site posed several developmental challenges to include the presence of over 30 feet of geotechnically unsuitable coal and cinder fill, as well as low levels of petroleum related contamination associated with historic industrial use. “Otherwise, the site posed an excellent re-development opportunity,” says Dillon Baynes, President of the Atlanta based firm of Orinda, Inc. “Our preliminary environmental study identified the potential presence of relatively modest contamination, but we believed strongly in the project and sought to manage our environmental risks,” says Baynes. After considering several options, Orinda’s next stop was with the Virginia Department of Environmental Quality (VADEQ) who agreed to accept the project into the State Brownfields program.

The Virginia Voluntary Remediation Program (VRP) is part of the state’s Brownfields Program to promote re-development. Many commentators believe that Virginia’s program is “developer-friendly” and reflects a strong political mandate to get abandoned properties back on the tax rolls. The VRP is a cooperative program administered by the VADEQ wherein owners may voluntarily enter into “cleanup” agreements with the agency. There is no requirement that the site must actually be contaminated to be eligible for liability protections. The program requires that the site be adequately characterized, the risk assessed and remedial activities (if warranted) be completed in accordance with VADEQ guidelines. The owner or prospective purchaser has the option to include the soils only, groundwater only or both in requesting VADEQ review. In many instances, no “cleanup” is actually completed, rather, the parties agree

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to certain deed restrictions and/or engineering controls to limit exposure to potentially hazardous soils and/or groundwater. Once all of the necessary criteria are met, the State will issue a “Certificate of Completion” indemnifying the current and future site owners from future state and federal enforcement actions related to contamination that has been identified at the site. The result is that properties that were once passed over, are now getting a second look, and a stronger economic tax base for the community and favorable returns for the re-developer.

An added boost to the project came through the funding option available through the VADEQ Program, which allows real estate developers to obtain low interest loans of up to \$1 million. According to VADEQ, “the purpose of this Brownfield remediation financing legislation is to provide a source of low-interest loan financing to encourage the cleanup and reuse of contaminated properties.” Because the source of money to begin this funding initiative is through Virginia's Water Facilities (Wastewater) Revolving Loan Fund, there are various Federal funding policies that place limitations on eligible activities. Importantly, the State's funding program must serve a public purpose by protecting or restoring a ground water supply or eliminating surface water degradation. In order to be considered for funding through this low-interest loan initiative, the project remediation effort must 1.) improve or prevent a groundwater or surface water quality problem, and 2.) the applicant must be able to demonstrate loan repayment capability to the satisfaction of the program including the provision of adequate collateral if necessary.

“The ability to obtain loan interest funding definitely made a difference in our decisions to move forward with this development,” says Coran Capshaw, the property owner. “We were able to manage the environmental and challenging geotechnical issues at the same time, which allowed us to further leverage our investment in this exciting mixed-use project,” adds Capshaw.

Orinda is currently seeking other Brownfields projects and has several exciting deals in the pipeline. “The regulatory climate is right to find value in these projects,” says Baynes, who recommends assembling the right team of experts to work through the associated legal and technical requirements. “We had excellent support throughout the project and found workable solutions to issues presented” says Baynes.

So, maybe it isn't “money for nothing”, but low cost loans and other incentives are making Brownfields re-development more attractive than ever.