

BROWNFIELD REDEVELOPMENT: WHAT DO THE INDUSTRY AND CONSULTANTS NEED TO KNOW?

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This presentation provides general information and is not intended to provide legal advice.
Audience members should seek legal advice for specific situations.

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Overview

- **Brownfields Basics**
- **Environmental Due Diligence**
- **Redevelopment Plans**
- **Benefits of Brownfield Development and Consequence of Inaction**
- **Regulatory Regime**
 - Saskatchewan
 - Ontario

What are Brownfields?

- **A brownfield property is**
 - vacant, derelict or underutilized
 - previously used for commercial or industrial purpose; past activities may have left contamination
 - service stations
 - dry-cleaning establishments
 - manufacturing operations
 - waste disposal facilities
 - oil and gas processing and storage facilities
 - may pose health, environment or safety risk
 - costly to manage

Brownfields Basics

- **Brownfield contamination can include**
 - groundwater and surface water contamination – contaminants enter the surface water and groundwater systems
 - soil contamination – contaminants enter and remain in the soil
 - soil vapour – contaminants in the soil enter overlying buildings as vapour, causing air quality problems
- **A potential brownfield property is assessed based on the location, intended future land use, type and level of contamination, potential remediation requirements, and project planning and construction**
- **Findings of due diligence assessments can impact project viability, plans, timelines and costs**

Environmental Due Diligence

- **Key to understand risk and challenges that may arise and delay or prevent the development project from going forward**
- **Environmental due diligence to understand and, where possible, mitigate the environmental, regulatory and financial risks and liabilities early in the process**
 - assess federal, provincial/territorial and municipal requirements
 - consider Indigenous rights and consultation requirements
 - confirm actual or potential contamination, species at risk, items of archaeological significance
 - consider approvals/permits/environmental concerns (air, water, waste, noise, dust, vibrations, excess soil) for redevelopment and construction activities

The Redevelopment Plan

- **Often brownfield developments take longer than greenfield development because of the additional environmental issues and regulatory requirements**
 - **Studies** – performing ESAs to determine the extent of contamination, set out objectives, develop a remediation plan
 - **Rehabilitation/Remediation** – where contamination is confirmed, the subject site must be remediated and the appropriate confirmation of compliance from the applicable federal, provincial/territorial and municipal authorities
 - **Redevelopment** – considerations given during the redevelopment to mitigate environmental issues, monitoring and ongoing post-remediation work, project construction ongoing

BENEFITS OF BROWNFIELD DEVELOPMENT & CONSEQUENCE OF INACTION

Economic benefits

- ▶ Stimulating local business
- ▶ Increasing tax revenue
- ▶ Increasing property values
- ▶ Driving development in adjacent areas
- ▶ Leveraging private investment
- ▶ Using existing infrastructure (sewer, water, roads)

Social benefits

- ▶ Improving public health and safety
- ▶ Revitalizing neighbourhoods
- ▶ Enhancing community aesthetics and pride
- ▶ Creating potential for new housing, community infrastructure and public spaces

Environmental benefits

- ▶ Reducing environmental risks
- ▶ Improving air, soil and water quality on and off-site
- ▶ Reducing urban sprawl and related greenhouse gas emissions
- ▶ Preserving agricultural land by reducing pressure for greenfield development

Potential consequences of inaction

- ▶ Reduced property values
- ▶ Blighted neighbourhoods
- ▶ Poor local development and investment
- ▶ Unpaid taxes
- ▶ Under-utilized infrastructure
- ▶ Urban sprawl and pressure on greenfield land
- ▶ Environmental damage on- and off-site
- ▶ Contaminated soil and groundwater
- ▶ Public health and safety risks
- ▶ Liability issues
- ▶ Illegal dumping, vandalism and crime
- ▶ Higher enforcement and policing costs

Understanding Regulatory Requirements for Brownfield Redevelopment

- With the exception of federal lands (which may be found on the Government of Canada's Federal Contaminated Sites Inventory), contaminated sites are under the jurisdiction of provincial/territorial governments
- **The Law (in Saskatchewan)**
 - *Environmental Management and Protection Act, 2010*
 - Saskatchewan Environmental Code and guidance documents
- **The Law (in Ontario)**
 - *Environmental Protection Act, Part XV.1 – Records of Site Condition*
 - Ontario Regulation 153/04: Records of Site Condition - Part XV.1 of the Act
 - Ontario Regulation 407/19: Amending O. Reg. 153/04
 - Soil, Groundwater and Sediment Standards for Use under Part XV.1 of the Act

Understanding Regulatory Requirements (Saskatchewan)

- **Step 1: Reporting Discharges and Discovery**

- discharge of substances causing adverse effects or meeting criteria in Table 1 Discharge and Discovery Reporting Standard
- discovery of environmental impact causing adverse effect or serious risk to environment/health/safety or meeting criteria in Table 2 Discharge and Discovery Reporting Standard
- Immediate and follow up reporting in certain circumstances, and reporting within 30 days in certain circumstances
- Ministry advises to err on the side of reporting

Understanding Regulatory Requirements (Saskatchewan)

- **Step 2: Site assessments to characterize and delineate substances impacting a site, including understanding the potential effects and evaluating risks**
 - alternative solution for site assessment process
 - proposed to the Minister for review and acceptance based on results-based objective set out in Section 2-1 of Site Assessment code chapter
 - includes environmental protection plan certified by qualified person
 - acceptable solution for site assessment process
 - complete Visual Site Assessment Checklist, submitted to Minister
 - follow CSA standard for Phase II ESA where site assessment is required or chosen, or conduct alternative solution site assessment

Understanding Regulatory Requirements (Saskatchewan)

- **Step 3: Create Corrective Action Plan that results in the most effective remedial options that meet the chosen environmental objectives and endpoints for the impacted site**
 - Selection of appropriate Tiered endpoint – Tier 1 (generic - most conservative), Tier 2 (exposure pathway modification/elimination), Tier 3 (Risk Assessment or site specific criteria)
 - Acceptable solution – Tier 1 or Tier 2 and accepted reclamation technology (can be commenced immediately)
 - Alternative solution (Environmental Protection Plan) - reclamation activities meets the risk-based objectives in section 2-1 of Corrective Action Plan code chapter, require acceptance by Minister before implementation

Understanding Regulatory Requirements (Saskatchewan)

- **Step 4: Application for Notice of Site Condition and Transfer of Responsibility**
- **Notice of Site Condition – discloses the final environmental condition of the site that has undergone corrective action**
 - Acknowledgment by the Minister that the work completed meets the requirements
 - Lists required controls to be maintained indefinitely (or no longer necessary)
 - Filed on the registry
 - Reopeners if violation of terms/conditions or different environmental condition
- **Transfer of responsibility for environmentally impacted site**
 - Transfer by agreement to party willing to take on corrective action plan and responsibility for impacted site
 - Financial assurance sufficient to reclaim the site required

Understanding Regulatory Requirements (Ontario)

- **Changing to a more sensitive property use or at request of insurers, purchasers, vendors, lenders, or municipalities**
- **To file an RSC on the ESR:**
 - Phase I ESA (desktop review to assess possible Contaminants of Concern and Areas of Potential Impact)
 - Phase II ESA (determine the location and concentration of contaminants in soil, groundwater and vapour and prepare a Conceptual Site Model)
- **Consider and implement remedial activities where a site does not meet the applicable regulatory standards**
 - available technology, effectiveness, practicality and costs of implementation, long term requirements of redevelopment (parking garages, 1st level commercial)

Understanding Regulatory Requirements (Ontario)

- **Qualified Person must certify**
 - No Phase Two ESA is required, file RSC, **or**
 - Where a Phase Two ESA is required, either
 - meets the regulatory site condition standards for all contaminants (before or after remedial efforts) or
 - a Risk Assessment prepared for the property accepted by the MECP Director
 - Modified Generic Risk Assessment – streamlined with defined parameters that may be varied by QP
 - Tier 3 RA – site specific standards that are less stringent, pathway exposure assessed, and Risk Management Measures may be required (e.g. engineering controls, construction of barriers, air ventilation, specific use at ground level, ongoing monitoring)

Understanding Regulatory Requirements (Ontario)

- **If RA accepted, Certificate of Property Use issued by Ministry with required property use restrictions and risk management measures**
- **An Order for Contravention of the Certificate of Property Use may be issued against a person who contravenes a term or condition of a CPU or a RMM**
- **The filing of a RSC may**
 - demonstrate the site meets regulatory or site-specific standards
 - permit redevelopment without necessarily removing all contaminants
 - provide limited due diligence protection
 - provides limited protection from regulatory orders – ‘reopeners’
 - require ongoing obligations and restrictions on development

But, no protection from civil lawsuits

Contaminated Sites Key Concepts

- **Promote Redevelopment of Brownfield/ Contaminated Sites**
- **Protect Human Health, Environment, Ecology**
- **Contaminant/Contamination Assessment**
- **Standards/Guidelines Applicable**
- **Qualified/Responsible Person/Professional**
- **Remediation/Reclamation**
- **Risk Assessment/Risk Management Measures**
- **Regulatory Approval/ Liability Allocation**
- **Contaminated Sites Database or Registry**

Considerations for Brownfields Work

- **Consult with team of professionals (legal, environmental, planning, financial)**
- **Environmental risks – ask lots of questions!**
- **Conduct robust due diligence**
- **Understand the regulatory regime within which the brownfield redevelopment will occur and the requirements**
- **Complete necessary/appropriate environmental studies**
- **Undertake required remediation/reclamation**
- **Obtain available protections from regulatory action**
- **Initiate redevelopment and construction**

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