

## Environment and Real Estate Alert

### Time for Good Buys? Brownfield Investments Attractive Again

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Whether the real estate market is recovering or bouncing along the bottom is not clear. While articles have begun to appear stating that land values in previously declining markets throughout the United States have begun to rebound, sometimes dramatically, other articles paint a far more ambiguous picture. What is clear is that there is a significant amount of capital chasing a limited number of deals, resulting, many times, in a feeding frenzy. The ability to identify below-market opportunities, therefore, is essential to developers looking to take advantage of the next cycle of the real estate market.

In this regard, the purchase and remediation of environmentally challenged real estate is a strategy worth considering. Bargains on brownfields properties are available throughout the country, and the low prices are not the only incentive to invest now. New programs may make public funds available to reimburse purchasers for transaction costs, such as environmental due diligence, and an easing of regulations affords new owners protection from certain environmental liabilities of prior occupants.

First, state and local governments responded to the downturn by encouraging the remediation and redevelopment of brownfields to an extent not seen in a decade or more. New York City, for instance, launched a grants program that will offer up to \$10 million over the next two years to stimulate cleanup and beneficial reuse of brownfields. The city is compiling a database of more than 3,000 properties, most of which suffer from only light or moderate contamination, for which it will make Brownfields Incentive Grants available. The grants will provide up to \$140,000 per property to fund title searches and Phase I or Phase II site assessments, as well as certain cleanup activities.

New Jersey and other states offer similar incentives through the tax code, providing for up to a 75 percent “rebate” of cleanup costs (where the redevelopment results in an increase in tax revenue) and otherwise reimbursing up to 50 percent of environmental remediation costs. Legislation under consideration in Pennsylvania would make available a \$3,500 tax credit to developers for each new employee hired at a remediated site.

Beyond these financial incentives, the environmental regulatory framework changed during the downturn to promote investment in brownfields and to foster the return of contaminated properties to beneficial use. Due diligence remains a staple of any investment, but the uses for that diligence expanded under the U.S. Environmental Protection Agency’s (EPA) Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violation (“Audit Policy”). The Audit Policy mitigates civil penalties for any pre-closing violations of environmental laws or permits discovered during pre-acquisition due diligence and provides similar relief for noncompliance that new owners do not discover until after taking control. Specifically, the Audit Policy—

- waives penalties related to environmental noncompliance by a prior owner if the new owner voluntarily and promptly discovers and discloses the violations
- waives penalties designed to capture economic benefits gained by a prior owner’s failure to make capital and other expenditures required by environmental law
- expands the window for new owners to report violations to at least 45 days from the date of closing



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- ignores the (typically upward) effect on penalties of prior violations at the purchased facility or at other facilities of the new owner.

A second “downturn” tool for managing environmental risk comes in the re-emergence of the state regulatory agency “comfort letter” or “bona fide prospective purchaser letter.” These letters provide assurance against regulatory action and can limit the amount of remediation, monitoring, or further action required at a site. EPA issues similar “Reasonable Steps” letters, which describe site-specific reasonable steps a new owner can take to limit its liability, assuming it conducted adequate due diligence.

Many companies that own environmentally challenged parcels have legal obligations to remediate those properties. In fulfilling these obligations, the various incentives that are in place to encourage cleanup create an opportunity for developers to joint venture with current owners in a win-win scenario. The current owner would fund most, if not all, of the cost of the environmental remediation, and the developer would fund the costs of entitling the property for a higher and better use. Upon completion, the owner will have both cleaned up its environmentally challenged land and had it rezoned for a more beneficial use, while the developer will have obtained access to a valuable and environmentally remediated development parcel.

Akin Gump Strauss Hauer & Feld LLP routinely assists clients in completing the necessary due diligence to qualify for these mitigating measures and will work with the EPA and applicable state and local authorities to help clients return contaminated sites to beneficial use while limiting environmental liability. Given the financial incentives now available for these projects and the bargain prices, now may be the time for good buys.

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