

Florida State University Journal of Land Use and Environmental Law

Volume 13
Number 2 *Spring 1998*

Article 7

April 2018

Book Review: Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property

Maribel Nicholson-Choice

Follow this and additional works at: <https://ir.law.fsu.edu/jluel>



Part of the [Environmental Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Nicholson-Choice, Maribel (2018) "Book Review: Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property," *Florida State University Journal of Land Use and Environmental Law*: Vol. 13 : No. 2 , Article 7.
Available at: <https://ir.law.fsu.edu/jluel/vol13/iss2/7>

This Book Review is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Land Use and Environmental Law by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

BOOK REVIEW

MARIBEL NICHOLSON-CHOICE*

BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY. BY TODD S. DAVIS AND KEVIN D. MARGOLIS with a preface by Vice President Al Gore. Section of Natural Resources, Energy, and Environmental Law American Bar Association: 1997, Pp. 703. \$139.95

I. INTRODUCTION

As the New Millennium approaches, we are faced with evidence of a new era of environmental programs meant to revitalize urban areas by returning idled and contaminated properties to productive land uses, with the vision of sparking, like a flame, economic growth, new jobs, and hope in once economically depressed communities. Currently underway is the United States Environmental Protection Agency's (EPA) brownfields initiative. Meanwhile, many states are following the federal government's lead in adopting legislation and rules to implement a state level brownfields initiative. For example, earlier this year, the Florida Environmental Regulation Commission adopted the Florida Department of Environmental Protection's proposed rule implementing the 1997 Florida Brownfields Redevelopment Act.¹ Throughout America, the recycling of contaminated property is turning what were once environmental liabilities into opportunities for property owners, developers, companies, and bankers to help create a cleaner environment, more jobs, and a larger tax base. For American cities and counties, this era of new environmental programs brings promise and hope for more sustainable inner-city districts. The complex nature of brownfields issues stems from the potential for environmental, health, and financial disaster inherent in recycling contaminated property. Due to the complexity of this subject, the proposed book is divided into four parts, which provides a focused analysis of this subject.

* Environmental and land use attorney with Greenberg Traurig Hoffman Lipoff Rosen and Quentel, P.A.; 1998 Vice-chair of the Florida Environmental Regulation Commission; J.D., University of Miami School of Law, 1990.

1. FLA. STAT. Ch. 376.77-84 (1997).

II. PART I—BACKGROUND INFORMATION

In Part I of the book, the term *brownfields* is defined as "abandoned, idled or underused industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination that can add cost, time, or uncertainty to a redevelopment project." This language is also the EPA's working definition of a brownfields. Also in Part I, the point of view of those persons or groups with an interest in brownfields redevelopment are identified, as well as their potential risks, and benefits if a project is successful. Environmental groups, bankers, developers, neighboring homeowners, site owners, and regulators each play an important role in brownfields redevelopment. The success of a potential brownfields project depends on the ability of interested parties to not only understand their individual risks and benefits, but they must also understand the risks and benefits to other players so that a concerted and collaborated effort may materialize to the benefit of everyone. After identifying the issue and players, the book presents an overview of federal and state laws governing brownfields cleanups, including the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and parallel state statutes. However, since states' brownfields laws are currently evolving, this book does not include an analysis of Florida's new brownfields act² and implementing rule³. Next, the Clinton Administration's Brownfields Initiative is presented along with the EPA Administrator's, Carol Browner's, demonstrated commitment to a plan of action with respect to brownfields redevelopment.

III. PART II—LEGAL, BUSINESS, FINANCIAL, AND POLITICAL ISSUES ASSOCIATED WITH REDEVELOPING CONTAMINATED PROPERTY

Part II of the book provides a step-by-step "how-to-do" a brownfields deal, beginning with identifying a potential brownfields site and prospective use; establishing its property value and making an offer to purchase; negotiating terms, conditions, and a purchase price; closing the deal and taking title; and finally proceeding with development. Next is a zeroed-in analysis of two investor-focused issues: whether anticipated remediation costs associated with particular chemical(s) at a site make acquisition of that site financially feasible for a prudent investor, and whether the site will

2. FLA. STAT. CH. 376.77-.84 (1997).

3. FLA ADMIN. CODE CH. 62-785 (1998).

be marketable for the investor's anticipated reuse after a economically feasible remediation has been accomplished. Valuation of contaminated property is analyzed by the book's authors, first considering the estimated value of the property with and without contamination, and then the difference between the two values which would indicate the loss in total value due to contamination. From a continued investment perspective, a close look at creative financing strategies for redeveloping brownfields is provided in Part II. Lender concerns regarding liability and EPA's creative efforts to address this concern in order to facilitate financing of brownfields redevelopment is succinctly summarized, along with state initiative in this regard. EPA has taken several steps to demonstrate its commitment to brownfields projects. In December 1996, EPA began accepting applications from cities, counties, towns, and Indian Tribes for brownfields assistance grants up to \$200,000 each. These funds may be used to assist in Phase 1 and Phase 2 site assessments, or to help creatively resolve problems at selected brownfields sites.

Historically, banks have avoided lending money to brownfields redevelopment projects on the premise that, in the event of foreclosure, a lender can be held liable whenever an owner can be held liable. To encourage private sector financing for brownfields redevelopment, EPA has taken the following measures to reduce commercial lending risks: issued a guidance document on Prospective Purchaser Agreements, expanding the circumstances when EPA will not sue purchasers of contaminated property for contamination that occurred before the purchase; issued a policy statement to reassure property owners that EPA will not file suit against them for groundwater contamination on their property caused by acts on a nearby property; issued a Superfund and Underground Storage Tank Lender Liability Guidance document to explain its policy of not pursuing banks for cleanup costs; adopted a policy to allow for the issuance of *comfort letters* useful to facilitate lending transactions relating to brownfields properties.

The different comfort letters that EPA allows to be issued include No Previous Interest Letters, No Current Superfund Letters, Federal Superfund Interest Letters, and State Action Letters. A No Previous Superfund Interest Letter indicates that there is no historical evidence of Superfund program involvement with the property in question. A No Current Superfund Interest Letter indicates that the property has had, but no longer has, federal Superfund interest or that it is near, but not within, property where there is current interest. A Federal Superfund Interest Letter indicates that EPA has (or plans) to respond at the site and the status of any such response. A State Action Letter indicates that the state has taken the lead role

for a response action at the property. EPA's efforts, reducing environmental liability for banks and providing federal dollars for local governments, presents new opportunities for brownfields redevelopment in cities and counties throughout America.

Part II then turns to federal income-tax issues. The federal income-tax implications presented by brownfields redevelopment are an important tool for investors. The often-astronomical costs associated with remediation of a contaminated site may be deductible. Part II of the book analyses those instances when these costs should be capitalized and added to the property's tax basis, and other federal income-tax implications. Part II also contains three chapters which analyze political issues surrounding brownfields redevelopment, including the importance in building community support for a project; managing the media; and environmental equity.⁴ Two additional chapters focus on environmental insurance coverage as a vehicle to transfer or contain the risk of redeveloping a brownfields. This analysis considers coverage issues relative to both new and old insurance policies. Finally, in Part II, the importance in hiring a reputable laboratory to complete a site investigation is highlighted along with the investor's role in properly delegating scientific issues to laboratories and legal issues to environmental lawyers. Improperly managing such issues could prove to be an expensive mistake for the novice investor.

IV. PART III—SCIENTIFIC CONCEPTS USED TO ADDRESS CONTAMINATED PROPERTY

A discussion of geologic and hydrogeologic principles is contained in Part III. The discussion is sufficient enough to orient readers about chemical transport and the varying phases of soil, bedrock, and groundwater contamination that are commonly found at former industrial and commercial sites. The concept of risk assessment is applied to environmental health issues, beginning with identifying the hazard, conducting a dose-response and exposure assessment, and concluding with a risk characterization. The final result is a calculated and quantitative estimate of risks under various conditions of exposure. The concept of risk-based corrective action (RBCA) is a clean-up standard that is based on the anticipated future use of the property. For example, the soil or sand clean-up level for a site to be used for a child daycare center where children are expected to play outdoors would be much higher than the clean-up level for a

4. See Maribel Nicholson & Ralph DeMeo, *Air of Equality: An Analysis of Florida's Environmental Equity and Justice Act*, FLA. B. J., Oct. 1994, at 112.

parking lot under RBCA. By a consensus, the RBCA process makes practical and common sense from a financial perspective, but it is controversial in regard to human exposure assumptions. There is a critical analysis of RBCA in Part III of this book, followed by a physician's perspective about the human health exposure assumptions in the RBCA process. Finally, the remainder of Part III provides a series of risk-based remediation strategies which include washing, stabilization/fixation, vapor extraction for contaminated soil and in-well stripping, in-situ biodegradation, and liquid removal for contaminated groundwater.

V. PART IV—STATE VOLUNTARY CLEANUP PROGRAMS

The final part of this book offers a discussion of state voluntary cleanup programs implemented in Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. As previously mentioned, after this book was published, the Florida Legislature took significant initiative in regard to brownfields legislation that of course is not included in this book.

VI. CONCLUSION

This book is an excellent tool for lawyers who wish to become acquainted with the complexities of brownfields redevelopment. The authors do an excellent job at not limiting their analysis to any one point of view. On the contrary, these authors begin their discussion by clearly defining the term, and then proceed with analyzing the subject of brownfields redevelopment from multiple perspectives, including developers, regulators, environmental groups, health professionals, bankers, and property owners. No matter which one of these interested parties is the client, this book contains valuable information so that a lawyer may successfully assist any client involved in a brownfields redevelopment project.