

Avoiding Missteps in Brownfield Development and Best Practices

Larry Schnapf

Schnapf LLC

Larry@schnapflaw.com

Brownfield Basics

- Primarily Real Estate Transaction
- Intense Competition for Capital
 - Debt
 - Equity
- Entitlement and Remediation Risks
 - Delays and Costs
- Community Opposition
- EB-5 Opportunities in NY?

Where Is Your Client In “Capital Stack”?

- Capital Stack
 - Senior Lender (75%)
 - Mezz Lender (15%)
 - Investor Equity (9%)
 - Sponsor Equity (1%)

- Waterfall Distributions
 - IRR “Hurdle” levels

- Brownfield Financing
 - Timing
 - How used in capital stack

Does Appraisal Reflect Environmental Issues

- USAP A09
 - Appraiser pressure to meet contract value
 - Few competent to assess environmental risk
- “As if” vs. “As is”
 - Not conforming unless “as is”
- “As is” imperiled not necessarily mean “as if”
minus cleanup costs

Deal Structure

- Seller Joint Venture
- Seller Financing
 - Mezz
 - Seller 2nd Mortgage
 - Seller senior mortgage
- Purchase Options
 - Entire property or phases
- Sale with Extended Period to Close
 - Good for winding down operations
- Sale with RP remediation

Project Schedule

- Site Control vs. Site Ownership
 - Lead time for assemblage
 - How long before construction
 - Phased construction
- BFPP Issues
 - No “disposals”
 - Appropriate Care
 - Phase 1 Recommendations

Diligence Issues-examine assumptions

- Historic operations
- Chemical and waste handling areas
- Sumps
- Separators
- Piping
- Illegal or unknown disposal
- Railyards
- Fires
- Riverfront property (NRD?)

Abandoned Building Issues

- Drums, tanks, transformers
- Utilities
- Winterizing
 - Bursting pipes and drums
- Security
 - Exterior lights, interior cameras, guards, boardups
- Inspections
- Moisture (roof and windows)

Demolition/Construction Issues

- Contaminated Debris (e.g., PCBs in concrete)
- LBP/ACM
- M/E liquidation
- Drums and waste disposal
- Animals Squatters (e.g., bats, endangered species)
- Waste Aggregators (destruction/disposal certificate)
- Waste Brokers (non-owned site coverage)
- Recycling-remember *Burlington Northern*
- Phased Construction
- Fill Material

Significant Brownfield Caselaw

- *AMCAL Multi-Housing v Pacific Clay Prods*, 457 F. Supp. 2d 1016 (C.D. Ca. 2006)
- *U.S. v Honeywell*, 542 F. Supp. 2d 1188 (E.D. Ca. 2008)
- *Bonnieview Homes Assoc v Woodmont Builders*, 655 F. Supp. 2d 473 (D. N.J. 2009)
- *Ford Motor Co v Edgewood Prods.*, 2012 U.S. Dist. LEXIS 125197 (D. N.J. 8/31/12)
- *Saline River Prods v Johnson Controls*, 2012 U.S. Dist. LEXIS 113593 (E.D. Mich. 8/13/12)
- *Ashley II of Charleston v PCS*, 791 F. Supp. 2d 431 (D.S.C. 2011)
- *3000 E. Imperial v Robertshaw Controls*, 2010 U.S. Dist. LEXIS 138661 (C.D. Ca. 12/29/10)

BCP Common Application Issues

■ Application

- Phase 1 “typical of historic fill”
- USTs can complicate volunteer status
- Wrong signatory
- Inadequate evidence of signing authority
- Proof of Access by Non-Owner Applicant

■ Eligibility

- Petroleum Sites
- Historic Fill Sites
- Enforcement orders

Getting Across Finish Line: Most Common Problems

- Environmental Easements
 - Need to Submit By September
 - Markup Environmental Easement
 - Need to be Recorded Before FER/SMP
- Certificate of Completion
 - Verify applicant entity
 - Lot and block

Post-COC Common Mistakes

- COC Transfers
 - Fail to advise DEC prior to sale
- Change in Use
- Failure to Achieve GW Track 1 Levels
 - Five years to achieve
 - Recapture tax credits?