

# Analysis & Perspective

This article, the second of two parts, reviews state and local financial incentives available to developers of industrial properties abandoned because of contamination. It also discusses some practical considerations for the use of developers and their advisors in evaluating a proposed brownfields redevelopment project.

Part I, which reviewed federal financing tools and those available from non-profit organizations, appeared in the Jan. 7 issue of the *Toxics Law Reporter* (12 TXLR 870).

## FINANCING BROWNFIELDS DEVELOPMENT: Part II

BY LARRY SCHNAPF

**N**early all states have financing programs that have been used to encourage redevelopment by easing the cost of borrowing and filling funding gaps left by private lenders. Economic development authority loans serve as an inducement to private sector lenders by reducing the size of the loan and lowering the risk. A number of states have begun to use these traditional programs to target brownfields redevelopment.

### STATE AND LOCAL FINANCIAL INCENTIVES

**I. Industrial or Economic Development Authorities.** Most states issue economic development loans through industrial or economic development authorities (IDA/EDA). These agencies can help coordinate regional brownfields development since they have more expertise and can leverage more private lending than individual municipal governments. Some IDA/EDA allow a portion of the loan facility to be set aside to pay for the assessment and cleanup of a property. However, since these agencies have the same liability concerns as private lenders, they often require developers to enter into voluntary cleanup agreements with the state environmental agency that provide a complete release from liability for any contamination at the site.

Another source of funding can be revolving loan funds (RLFs) administered by IDA/EDA. Under this approach, the IDA/EDA will acquire and remediate contaminated property using RLF money. Upon the completion of the remediation, the IDA/EDA may sell or lease the property. Some states allow the IDA/EDA to provide prospective landowners with indemnities and releases from liability. The proceeds from the sale or lease of the properties may then be used to replenish

the RLF. Revenue collected from property taxes, the sale of bonds, federal EDA financial assistance, and sums collected from cost recovery actions filed against PRPs for those sites have also been used to restock RLFs.

**II. Business Development Corporations (BDCs).** These entities may be used as an alternative to direct loans or loan guarantee programs when state constitutions prohibit the use of public funds for assisting private businesses. The BDCs raise their capital by issuing stock to institutional investors such as banks, pension funds, and insurance companies. Since BDCs are not subject to the same financial performance requirements as chartered banking institutions, the BDCs can handle higher risk loans.

**III. Tax Incremental Financing (TIF).** Approximately 40 states have TIF mechanisms which have been traditionally used to stimulate redevelopment in economically depressed areas. TIF can create a source of funding for development by using the anticipated growth in property taxes generated by a redevelopment project as collateral to secure bonds issued to pay for site acquisition and development. The incremental increases in tax revenue from the redeveloped properties are captured by the TIF fund to pay off the principal and interest costs of the bonds. A number of states have used TIF specifically to also pay for remediation costs of brownfields. TIF bonds are then used to pay for site assessments and remediation with the increased tax revenues earmarked to retire the bonds.

**IV. Property Tax Abatements.** State and local governments have long offered property tax abatements to attract or retain business and industry. Some states have extended this tool to foster brownfields redevelopment. The property tax abatements help reduce the cash flow requirements of a project that has to incur remediation costs. The particular approach varies, but typically the property tax for the property to be redeveloped may be

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frozen at its pre-improved value or the tax may be reduced for a certain period of time.

**V. Remediation Tax Credits (RTCs).** Some states allow developers of brownfields sites to take a tax credit for the expenses incurred in remediating the sites. The effect of these tax credits is to drive down project costs and make the project more attractive to private lenders. Usually, the RTCs may be claimed in the year the remediation costs are incurred, with states limiting the amount of RTCs that may be claimed in any one tax year. A number of states also allow corporate income tax credits for new jobs created by the project.

**VI. Cleanup or Assessment Grants.** Many states issue grants to finance the environmental assessment and, in some instances, the cleanup of brownfields. The source of the grants is usually state Superfunds in which a portion of the Superfund is set aside to finance brownfields remediation. Other states may issue environmental bonds to pay for the cleanups. The eligibility requirements and amounts of these grants vary.

**VII. Remediation Loans.** As part of their voluntary cleanup programs, a number of states offer low-cost loans to parties that are not otherwise responsible for the contamination. The terms and conditions of these loans and the kinds of parties and sites that qualify for the loans vary from state to state.

**VIII. Underground Storage Tank (USTs) Funds.** Many states have established trust funds to help pay for the cleanup of contamination associated with releases of petroleum from USTs. These trust funds are maintained from taxes levied against petroleum products.

The eligibility requirements for these state trust funds vary as do any deductibles that may apply. For example, most state UST trust funds may be used only if the USTs are in compliance with state UST design and operating standards. Many UST trust funds do not apply to inactive USTs. Usually, the owner of the USTs must first incur response costs and then apply for reimbursement, but some states have taken over direct responsibility of UST cleanups because of fraudulent claims. Most states limit reimbursements to owners or operators of the USTs at the time the leak is detected. If the brownfields site has contamination that is associated with USTs and the state has a UST trust fund, owners and prospective developers should determine if the remediation costs would be eligible for reimbursement under the state UST program. In some cases, it may be necessary for prospective purchasers to obtain assignments of rights of reimbursement from the seller.

The Colorado Petroleum Storage Tank Fund (the Fund) is an example of a UST program that is particularly useful to prospective owners of brownfields. Under this program, property owners may be eligible for reimbursement if they have acquired the property after June 3, 1992, and are not responsible for the petroleum contamination. To demonstrate that it is not responsible for the contamination, the property owner must prove that it did not install, operate, or lease the UST; that it had no reason to know (through personal knowledge, observations, representations of the seller, or consultant reports) that a release had occurred; that the petroleum contamination was discovered after December 22, 1988; and, in the event of an abandoned UST, that the

property owner had no reason to know that the UST was present at the site.<sup>64</sup>

If the property owner inherited the property, it must demonstrate not only that it never operated or leased the USTs and did not have any reason to know of the petroleum contamination but also that the person from whom the property was inherited would have been eligible for reimbursement under the program.

Under Policy No. 12 issued by the Petroleum Storage Tank Committee, a property owner who is eligible for reimbursement may transfer ownership of the property prior to completion of the remediation and transfer the eligibility for reimbursement to its purchaser so long as the remediation is continued pursuant to the state requirements. In addition, under Policy No. 15, any person who is not responsible for the petroleum contamination and thus is eligible for reimbursement may request that the state perform the cleanup. This request must be made prior to the commencement of any emergency response or initial abatement actions.

**IX. Dry Cleaner Solvent Trust Funds.** A handful of states have enacted funds which can be used to pay for the remediation costs associated with releases of solvents from dry cleaning operations.<sup>65</sup> The scope of the programs varies in terms of the parties eligible to participate, the amount of the deductibles and the eligibility requirements. Some programs apply only to operators of existing dry cleaning establishments while others extend to prospective owners of properties such as shopping centers that have been contaminated by inactive dry cleaning operations. Some programs require the operators to comply with certain dry cleaning operating standards before they may be eligible for the program. A number of programs insulate participants from liability for property damage and personal injury resulting from exposure of solvents migrating off the property.

## STATE PROGRAMS

### ARKANSAS

Legislation was enacted earlier this year creating the Remedial Action Account (RAA). The purpose of the RAA is to provide financial assistance to prospective and current owners of abandoned, industrial, commercial and agricultural sites for performing site assessments and remedial actions.<sup>66</sup> The amount and terms of the financial assistance have not yet been determined.

### DELAWARE

Delaware has established a number of brownfields financial assistance programs. The Department of Economic Development has a grant program that funds 50 percent of assessment and remediation costs up to \$25,000 if the redevelopment would result in the expansion, retention, or startup of a new or existing business. Remediation loans of up to \$300,000 at an interest rate of 3 percent may be available from the state Superfund. Borrowers have to pledge collateral for loans up to \$250,000. Tax credits may also be available until the cleanup costs have been recouped. The tax credits in-

<sup>64</sup> C.R.S. § 8-20.5-206. See also Policy E20, Petroleum Storage Tank Committee, July 11, 1997.

<sup>65</sup> States that have established these programs include Florida, Georgia, Kansas, Minnesota, North Carolina, South Carolina, Tennessee and Wisconsin.

<sup>66</sup> Ark. Code Ann. § 15-5-902(a)

clude \$500 per new job created and \$900 for every \$10,000 of gross receipts generated by the new development.<sup>67</sup>

### FLORIDA

The Brownfields Redevelopment Act created a tax credit called the "Brownfields Redevelopment Bonus Refund Account." Under this program, an eligible business may obtain a tax refund of \$2,500 for each job created in a brownfields. The eligible business must be certified as a "qualified targeted industry business" by the state Office of Tourism, Trade and Economic Development. To participate in the program, a brownfields project must result in the creation of at least 10 full-time jobs, excluding construction jobs generated by the project, and must strengthen the economy of the area surrounding the site.<sup>68</sup>

### IDAHO

A property owner who performs a VCP cleanup may apply for a property tax exemption equal to 50 percent of the "remediated value" of the property for a period of up to seven years. The term "remediated value" refers to the incremental increase in assessed value of the property after remediation.<sup>69</sup> The exemption may be allowed only if the property remains in the possession of the owner and only so long as the covenant not to sue issued under the state VCP remains in effect.

### INDIANA

The state enacted legislation in 1997 that established a number of financial incentives to encourage the redevelopment of brownfields.<sup>70</sup>

**Environmental Remediation Revolving Loan Program.** The Indiana Development Finance Authority administers a revolving loan fund that provides a wide variety of financial assistance such as loans, grants, interest subsidies, loan guarantees, loan leverage programs, bonds, and loan pledges to local governments.<sup>71</sup> The funds may be used to identify, assess, and remediate brownfields. Private entities may not apply for financial assistance.

**Tax Abatements.** This program offers real and personal property tax abatements to qualifying entities that redevelop properties located in Brownfields Revitalization Zones (BRZ).<sup>72</sup> In order to participate in the program, the property must be designated as a BRZ and the owner must have received a "Certificate of Completion" indicating that a remediation was successfully completed under the state VRP. The property tax abatements may be for three, six, or 10 years. The property tax abatement for the first year is 100 percent and declines according to a schedule based on the length of the tax abatement.<sup>73</sup> The tax abatements are transferable to subsequent property owners provided they accept responsibility for the contamination and comply with any use restrictions placed on the property.

<sup>67</sup> Del. Code. Ann. Tit. 30 § 2011.

<sup>68</sup> Fla. Stat. Ann. § 288.107.

<sup>69</sup> Idaho Code § 63-602BB.

<sup>70</sup> Senate Enrolled Act. No. 360.

<sup>71</sup> Ind. § 13-19-5.

<sup>72</sup> Id. at § 13-11-2-19.3.

<sup>73</sup> Id. at § 6-1.1-42.

### ILLINOIS

The Legislature recently created an environmental remediation tax credit of up to 25 percent of eligible remediation costs incurred pursuant to the Site Remediation Program. To participate in the program, an applicant cannot be a responsible party and must have received a "No Further Remediation Letter" from the state Environmental Protection Agency. The total eligible remediation costs may not exceed \$700,000 and a \$100,000 deductible limit applies except for sites located in a designated Enterprise Zone. The maximum allowable Environmental Remediation Tax Credit may not exceed \$40,000 per year for the first three years nor may it exceed \$150,000 in the aggregate. Any unused tax credits may be carried over for the succeeding five years, but may be used to reduce a taxpayer's liability to less than zero. The credit is transferable with the property.<sup>74</sup>

### MARYLAND

A person who is not a PRP may be eligible for the following financial assistance once a cleanup plan has been approved under the state VCP.

**Remediation Loans and Grants.** The Department of Business and Economic Development (DBED) is authorized to create low interest loans and grants that may be used to remediate brownfields.

**Tax Abatements.** Owners of "qualified brownfields sites" are eligible for a five-year property tax credit of up to 50 percent of the property tax attributable to increased assessment of the property after cleanup; the local tax authority may grant an additional 20 percent credit. A portion of the taxes resulting from the increased value of the brownfields must be placed back into the Brownfields Revitalization Incentive Fund to help finance the cost of the remediation loans and grants. Properties that fall within the definition of "qualified brownfields sites" include properties located in urban areas that are underutilized or are industrial or commercial sites which pose a risk to human health and the environment. In approving an application for financial assistance, the state must evaluate a number of factors including the benefits that may result from site development, the likelihood that the project will attract new employers, the extent that the redevelopment will eliminate the risk posed by the contamination and the support of the local community.<sup>75</sup>

### MICHIGAN

Michigan has enacted a number of financial incentives to encourage the reuse and redevelopment of brownfields.

**Site Reclamation Grants.** This program provides funding to local governments to investigate and remediate contamination at brownfields sites slated for redevelopment. The grants, which are funded out of a \$35 million environmental bond fund, may be up to \$2 million per project. Approximately \$20 million has been expended. The funds may be used to perform interim and long-term remediation measures, but may not be used to replace drinking water supplies or for asbestos abatement

<sup>74</sup> 35 Ill. Comp. Stat. § 5/201(L) (1997 Ill. S.B. 939).

<sup>75</sup> 1997 MD 409.

or operation and maintenance costs. Any site that is developed using a reclamation grant may not be sold, disposed of, or converted to another use without the express approval of the state Department of Environmental Quality.<sup>76</sup>

**Site Assessment Grants.** This program, also funded from an environmental bond act, may be used to assess the environmental conditions of brownfields. Unlike the Site Reclamation Grant program, this program provides funding for sites where no specific redevelopment has been proposed but which have redevelopment potential. The assessment grants have often been used to pay for Phase I and Phase II baseline environmental assessments that are used to satisfy the innocent purchaser's defense under the Michigan Environmental Response Act.<sup>77</sup>

**Revitalizing Revolving Loan Fund and Program.** This program provides loans to local governments that may be used to perform site evaluation and demolition activities as well as interim response actions conducted prior to the evaluation and demolition activities. The loans may not be used for designing or completing an approved remedial action plan and all activities must be conducted pursuant to the approved plan. Borrowers do not have to begin loan repayment until the expiration of a five-year grace period and then have 15 years to repay the loan, whose interest rate is 50 percent below the prime rate.<sup>78</sup> This program is popular with local governments because they can continue to collect taxes during the five-year grace period and then use those taxes to begin paying back the loan.

**TIF.** Under the Brownfields Redevelopment Financing Act, local governments may create brownfields redevelopment authorities.<sup>79</sup> These authorities may identify eligible brownfields sites and establish a local site remediation revolving fund to pay for the cleanup of the sites. The fund may be used to pay for all response costs necessary to address a release at the site to be redeveloped as well as at other properties affected by the release.<sup>80</sup> The funds may be financed from loans obtained under the Revitalization Revolving Loan Fund or the authority may issue tax increment financing bonds or notes. The authority then captures all additional state and local taxes, including additional school operating taxes resulting from the increased value of the remediated property. These captured taxes may then be used to pay off prior loans or bonds or to finance additional remedial activities at other sites located within the brownfields authority's jurisdiction.<sup>81</sup> The authority may also file a cost recovery action against potentially responsible parties seeking reimbursement for response costs, including reasonable attorney fees, that were paid for with increment tax financing. All sums recovered must be put back into the local site remediation fund.<sup>82</sup> Some developers have opted to advance loans to the brownfields authority to pay for response actions at a brownfields site.

<sup>76</sup> Mich. Admin. Code § 299.5053.

<sup>77</sup> Id. at § 324.201.

<sup>78</sup> Id. at § 324.20108(b).

<sup>79</sup> Id. at § 125.2651-2672.

<sup>80</sup> Id. at § 125.2663(7).

<sup>81</sup> Id. at § 125.2658.

<sup>82</sup> Id. at § 125.2663(8).

**Business Tax Credit.** Persons who own or lease a brownfields and who are not otherwise liable as a PRP under the state superfund law, the Michigan Environmental Responsibility Act, may be eligible for a 10 percent business tax credit<sup>83</sup> for unreimbursed development costs associated with the brownfields site. The costs that may be applied for the credit include expenses incurred for demolition, construction, alteration, renovation, building improvements, machinery, equipment, and fixtures. The tax credit may be claimed for the tax liability beginning January 1, 1997, and ending December 31, 1999. The maximum amount of the tax credit that may be claimed in any one year is \$1 million. If the amount of the tax credit exceeds the taxpayer's tax liability for any one year, the taxpayer will not receive a tax refund. Instead, the portion of the credit that exceeds the tax liability may be carried forward for up to ten years.<sup>84</sup>

## MINNESOTA

**Low Interest Hazardous Waste Cleanup Loans.** This program allows small businesses to obtain loans at a rate 1 percent below the prime interest rate that may be used to investigate and remediate contaminated properties. To be eligible for the low interest loan program, a business must employ less than 50 full-time employees, report an after-tax annual profit of less than \$500,000 and possess a net worth of less than \$1 million. In addition, the small business must be either a generator of hazardous waste or an owner or operator of a facility where there is a known or suspected release. Finally, the small business must retain a qualified contractor and submit a cleanup plan approved by the MPCA. The loans range from \$1,000 to \$50,000 and must be repaid within five years.

**Contamination Cleanup Development Grant Program.** This program<sup>85</sup> is administered by the Commissioner of Trade and Economic Development and makes grants available to qualifying public development agencies such as cities, port authorities, economic development authorities, and housing and redevelopment agencies. Private entities can obtain funding by working through the development agency in the jurisdiction where the project is located. The grant may cover up to 75 percent of the response costs at a site up to 50 percent of the appraised value of the site after taking the contaminated state of the property into account. The municipality where the property is located must pay 50 percent of the project costs. The funds may be used for investigating, developing, and implementing response actions at sites where there is public or private development potential. Grants may not be issued for sites where federal or state Superfund-financed response actions are planned during the current or following fiscal year.

**Tax Base Revitalization Account.** This program establishes grants to clean up contaminated properties so that they may be redeveloped for commercial and industrial use. Cities located within the seven-county metropolitan region of Minneapolis-St. Paul and who participate in the Metro Livable Communities Act's Afford-

<sup>83</sup> Id. at § 208.38(d).

<sup>84</sup> Id. at § 208.38(d)(4).

<sup>85</sup>

<sup>85</sup> Minn. Stat. § 116J.551.

able Housing Program may apply for the grants. The funds must be used to implement response plans approved by the MPCA to remediate hazardous waste, petroleum or Health Department approved asbestos abatement projects. The grants may not be used to investigate the extent of contamination at a site, but may be used to help pay for the portion of the local match required under the Contaminated Cleanup Development Grant Program. The grants are issued on a competitive basis to those projects that offer the highest return of public benefits. Factors that are considered include the degree that the project preserves and/or increases wages in the area, promotes compact and efficient development to minimize urban sprawl, increases the tax base of the recipient community, and represents innovative partnerships among government, public, and private sectors.

**Redevelopment Grant Assistance Program for Non-Profit Organizations (RGAP).** The state Voluntary Investigation and Cleanup (VIC) unit administers a fund non-profit organizations may use to pay for the costs of Phase I and Phase II site investigations. The RGAP may not be used to finance site remediation and is intended to encourage redevelopment in areas where private financing is unavailable.

**TIF.** Local governments may establish tax increment financing districts to help finance the cleanup and redevelopment of contaminated properties.<sup>86</sup> Under this program, the property value of the contaminated property is reduced by the estimated costs of the remediation. Development costs are financed using bonds that are paid off using the increased tax revenue attributable to the new project. Extensions of time to repay the cleanup costs are available under certain circumstances.

### MISSOURI

The state has established financial incentives under its Brownfields Redevelopment Program to developers of qualifying properties. These financial incentives may be in the form of direct loans, guarantees, grants and tax credits.<sup>87</sup> To be eligible for financial assistance, a property must have been abandoned for at least three years, must be owned by a governmental agency at the time of the application, must be contaminated with hazardous substances or be perceived to have been contaminated with hazardous substances, and must be occupied by an eligible business upon completion of the project.

**Brownfields Tax Benefit (BTBs).** Operators or lessees may be eligible for a variety of tax benefits if the property is located in certain economically distressed areas. Businesses that operate or lease eligible projects may obtain income tax credits of between \$400 and \$1300 for each new job, investment tax credits ranging from 2.1 percent to 10 percent of the new qualified investment, exemption of 50 percent of taxable income attributable to the project, and a local property tax exemption of 100 percent for real property improvements for up to 15 years. The Brownfields Tax Credits may be claimed for four to 10 consecutive years. In the event

that a taxpayer cannot use all the credits in the first two years, a refund of up to \$50,000 for the first year and \$25,000 for the second may be available based on the Brownfields Tax Credits the taxpayer has earned.

**Remediation Tax Credits (RTCs).** The Department of Economic Development may grant RTCs to operators or lessees of eligible projects that create 10 new jobs or retain 25 existing jobs. The tax credits may be for up to 100 percent of all capital and operating costs including materials, supplies, equipment, labor, professional engineering, consulting and architectural fees, permitting fees and expenses, and direct utility charges for performing voluntary remediation. Operation and maintenance costs associated with post-remedial activities may also be eligible for the tax credit, but costs associated with ongoing environmental compliance or with pollution releases associated with the business operations are not covered. The tax credits also may not be used until after the state Department of Natural Resources issues a "No Further Action Letter" or covenant not to sue and the requisite number of jobs have been created or retained. The taxpayer has the option of taking the credit in the year the costs were incurred or within the succeeding 20 years.

The amount of the tax credits is limited to the lesser of the amount necessary to induce the owner to proceed with the project, the "net state economic impact," the eligible remediation costs, and certain income limits from the business. The tax credits may be assigned, transferred, or sold.

**Loan Guarantees.** If at least three qualified lenders are unwilling to finance the total amount of an eligible project, the DED may provide a partial loan guarantee to a lender. The maximum loan guarantee may be 70 percent or \$1 million, whichever is less. The loan guarantee may also not exceed the "net state economic impact" and must be less than the appraised value of the collateral. Any other grants or loans received by the applicant must be applied towards the \$1 million limitation. The lender issuing the loan to be guaranteed may not charge an interest rate that exceeds the prime rate plus 2 percent and the terms of the guarantee may not exceed 120 months. The borrower shall pay a fee of 2 percent of the guarantee loan amount at the closing and shall pay the DED an annual fee of one-half percent of the outstanding guarantee principal.

A lender that has foreclosed on abandoned property that qualifies as an eligible brownfields development project and has held title for at least two years may request that the DED use the loan guarantee money from the Reuse Fund to pay the unpaid balance of the defaulted loan. The lender will have to detail its efforts to sell the property and why those efforts were unsuccessful. Upon approval by the DED, title reverts to the local government.<sup>88</sup>

**Direct Loans.** If at least three qualified lenders are unwilling to finance the total amount of an eligible project and will also not accept the loan guarantee described above, the DED may make such loans directly. The maximum loan amount is 50 percent of the project cost or \$1 million per eligible project, whichever is less. The loan may not exceed the "net state economic impact"

<sup>86</sup> Id. at § 469.174-179.

<sup>87</sup> Id. at § 447.710-718.

<sup>88</sup> Id. at § 447.704.

and must be less than the appraised value of the collateral. The loan interest rate may not exceed the prime rate plus 2 percent or be more than 1 percent above the interest rate charged by the senior lender, whichever is greater, and the loan term may not exceed ten years or the term of the loan provided by the senior lender. The borrower must pay a fee of 2 percent of the loan amount at the closing.

**Due Diligence Matching Grants.** To provide incentives to prospective purchasers of brownfields properties, the DED may provide a grant equal to 50 percent of the costs to investigate the environmental conditions at an eligible site up to \$100,000. The remaining 50 percent of the costs may come from private sources or other government agencies so long as the DED retains ownership over the work product generated by the due diligence.

### NEW HAMPSHIRE

Municipalities are authorized to provide tax abatements to owners of eligible brownfields properties. The property owners must be liable for contamination at the property solely because of their status as site owners; they cannot have caused or contributed to the release. The legislation contains no time limit on the tax abatements, but provides simply that a municipality may grant a abatement of "prior years taxes and accrued interest to the applicant as it is deemed just and equitable."<sup>89</sup> Prospective purchasers, lenders, and owners of properties who are liable solely because of their status as landowners also are exempt from the state hazardous wastes generator fee for wastes generated from the remediation of brownfields sites.<sup>90</sup>

### NEW JERSEY

**Remediation Loans.** Parties required to remediate sites in New Jersey must establish a remediation funding source in an amount equal to the estimated remediation costs for the site that is used to pay for remedial activities. The state Hazardous Discharge Site Remediation Fund (HDSRF),<sup>91</sup> which is administered by the state Economic Development Authority has been established to provide financial assistance to parties who cannot establish the required remediation funding source. The financial assistance is available only for the amount of the remediation costs for which a remediation funding source cannot be obtained.<sup>92</sup> This restriction does not apply to grants issued to municipalities or innocent parties.<sup>93</sup>

Municipalities that hold a tax sale certificate on contaminated property or have acquired title to contaminated property through foreclosure may apply for grants to perform site assessments. If a remedial action is required at a site, a municipality may apply for a loan. However, the maximum amount of such loans and grants may not exceed \$2 million per site in any year. An owner of contaminated property that qualifies as an "innocent party" may receive a grant for up to 50 percent of the remediation costs not to exceed \$1 million.<sup>94</sup>

<sup>89</sup> 1997 NH Laws ch. 264(HB 636-Local)

<sup>90</sup> 1997 NH Laws ch. 269(HB 771-FN-Local).

<sup>91</sup> N.J.S.A. § 58:10-B et seq.

<sup>92</sup> Id. at § 58:10-B-5.

<sup>93</sup> N.J.A.C. § 19:31-8.3(f).

<sup>94</sup> Id. at § 19:31-8.5. An innocent party is defined as an owner who acquired property prior to December 31, 1983, provided that

Financial assistance in the form of a loan or loan guarantees is also available to owners or operators of industrial establishments that are being closed or transferred and must be remediated under the state Industrial Site Recovery Act.<sup>95</sup> Other private parties who qualify for financial assistance include those who remediate a site under the voluntary cleanup program, and anyone who is responsible for a discharge at a site.<sup>96</sup> Innocent landowners that receive a grant to finance 50 percent of their remediation costs can finance the balance through a loan from the HDSRF program. The loans may be used to pay for up to 100 percent of the estimated remediation costs, but shall not exceed \$1 million for private parties. The loans may have terms of up to ten years, with any unpaid balance due immediately if the property is sold or transferred.<sup>97</sup> In addition, under the Brownfields and Contaminated Site Remediation Act (S 39), signed by the governor Jan. 6, developers are eligible for a 75 percent reimbursement of their remediation costs. [Ed. note: See related story in Hazardous Waste Law section.]

**Tax Abatements.** Owners of "Qualified Real Property" may be eligible for a partial ten-year abatement of property taxes. For those sites that are remediated without the use of engineering controls or institutional controls, the abatement may be for as long as 15 years. To be eligible as a "qualified real property," a site must be vacant or underutilized, must appear on the state Department of Environmental Protection list of contaminated sites, and must be located in an Environmental Opportunity Zone. The site owner must enter into a memorandum of agreement or consent decree with the DEP to perform a VCP cleanup and execute a financial agreement with the local taxing authority that is recorded in the local land records. The property owner must make quarterly property tax payments to a designated environmental restoration fund which is based on the assessed value of the property at the time the application is approved. The required payments are based on a graduated sliding scale that increases by 10 percent each year until the tenth year when the full amount of the taxes based on the remediated value of the land must begin to be paid. The right to the partial tax exemption may be assigned to subsequent property owners.<sup>98</sup>

### NEW YORK

While no financial assistance is available under the state VCP, the Clean Water/Clean Air Bond Act of 1996 established funding for brownfields that are owned by municipal governments.<sup>99</sup> To obtain financial assistance, a local government must enter into a State Assistance Contract (SAC). Under this program, a local government may receive up to 75 percent of the funds necessary to remediate a site and must supply the remaining 25 percent itself. Costs associated with demolition of structures and disposal or abatement of asbestos are eligible for only 50 percent reimburse-

any hazardous substances discharged at the site were not used by that party at the site and the party certifies that he did not discharge any hazardous substance at an area where a discharge is discovered. N.J.S.A. § 58:10B-6(6).

<sup>95</sup> N.J.S.A. § 13 1K-6 et seq.

<sup>96</sup> Id. at § 58:10-B-5.

<sup>97</sup> N.J.A.C. 19:31-8.4.

<sup>98</sup> N.J.S.A. 54:4-3.150 to 158

<sup>99</sup> ECL 56.0101 et seq.

ment. However, costs incurred almost exclusively for demolition, indoor asbestos abatement, or lead paint abatement are not eligible for reimbursement, nor are costs incurred prior to the approval of the SAC. Legal services that are necessary to implement the project are reimbursable for up to 5 percent of the investigation costs.

Generally, sites that are identified as Class 1 or 2 sites on the state Registry of Inactive Hazardous Waste Sites are not eligible for the program. In addition, the municipality cannot be a PRP, although this exclusion may not apply when the government's liability is based solely on its status as an owner of the property.

The municipality need not own the property at the time of the application, but must hold title; funds cannot be disbursed until the local government provides evidence of ownership. Thus, private developers who would ordinarily not be able to obtain financing for remediating the site may enter into an agreement with a local government whereby the government performs the cleanup and then sells the property to the developer who then reimburses the local government for its share of the cleanup costs. Moreover, while a property can be subdivided prior to the completion of remediation, contaminated parcels may not be used either by the municipality or a successor until a cleanup approved by the Department of Environmental Conservation has been completed.

Municipalities are not eligible for funding if they indemnify other PRPs for remediation of the site. Indeed, the local government is required to assist the state in seeking reimbursement of response costs.

If a municipality receives proceeds from the sale of property remediated under a SAC from a cost recovery action or from the federal government, the shares of the state and the municipality are recalculated and any excess payments the municipality receives from the state must be repaid. Similarly, if the property is leased, the benefits to the municipality are calculated using the higher of the present worth of the stream of rent over a thirty-year period or the present worth of the fair market value of the property. Once those SAC expenses have been paid, the municipality's expenses may be paid. Any additional revenue must be equally shared by the state and municipality.<sup>100</sup> Any sale by a municipality to a PRP must be for a sum at least equal to the costs associated with the SAC, including transaction expenses and interest.<sup>101</sup>

Under the Bond Act, the DEC can give the participating local government a release from any common law or statutory liability and indemnity for all claims filed by third parties as a result of the contamination. The indemnity rights are assignable to a subsequent landowner.<sup>102</sup>

## OHIO

Financial assistance is available to volunteers remediating brownfields in the form of low interest loans for cleanup costs<sup>103</sup> and 10-year tax abatements on the increased value of the remediated property.<sup>104</sup> To qualify for the financial assistance, the property must be located in one of the following: Distressed Area, Labor

Surplus Area, Inner City Stressed Area, or Situational Distressed Areas.

## OKLAHOMA

Businesses that locate their principal business operations on certain contaminated properties qualify for incentive payments under the state Quality Jobs Act.<sup>105</sup> To qualify for the incentive payments, the business must be located on property that is at least ten acres in size. In addition, the property must be on the federal National Priorities List, must have been formally deferred to the state in lieu of being placed on the NPL, or must be subject to a removal action under the federal superfund law. To establish that the eligible property is its principal place of business, a company must show that 80 percent of its total annual gross sales are derived from the site. Businesses that meet these requirements can participate in the incentive payment program without having to comply with the minimum gross payroll and new job creation requirements of the Job Quality Act.

These incentive payments may consist of quarterly payments for a ten-year period from the Oklahoma Tax Commission in amounts equal to the net benefit rate multiplied by the actual gross payroll of new direct jobs created in a calendar quarter by that business.

## OREGON

Oregon recently enacted legislation establishing loan and grant programs to encourage brownfields redevelopment.<sup>106</sup>

**Brownfields Redevelopment Fund (BRF).** The Department of Economic Development (DED) may issue loans to finance environmental assessments. While PRPs may be eligible for the loans, no more than 40 percent of the fund may be disbursed to PRPs. Moreover, the DED may not approve loans to persons who knowingly violate environmental laws or fail to comply with orders issued by the state Department of Environmental Quality if such actions or inactions by the person contributes to or exacerbates existing contamination, causes a release, or interferes with a necessary investigation or remedial action. Additional factors that the DED must consider include the extent to which the actual or perceived contamination has affected the property from being fully utilized, the inability to obtain private financing, the extent to which redevelopment will reduce or eliminate contamination, the probability that the remediation will be successfully implemented after taking future uses into account, and whether the project has the endorsement of local government.

**Special Public Works Fund.** This fund allows municipalities to receive loans and grants when other loans are not available to finance environmental evaluations associated with infrastructure projects. The financing may not be used for off-site purposes, such as creation of a wetlands mitigation bank, even if project related.

**Credit Enhancement Fund.** This fund may be used to provide loans and credit guarantees to small businesses and companies in the value-added wood products and value-added agricultural industries. This financial assis-

<sup>100</sup> Id. at § 56.0503

<sup>101</sup> Id. at § 56.0505.

<sup>102</sup> Id. at § 56.0509.

<sup>103</sup> Ohio Rev. Code Ann. § 6123.

<sup>104</sup> Id. at § 5709.

<sup>105</sup> Enrolled Senate Bill No. 668, amending 68 O.S. Supp 1996 § 3604.

<sup>106</sup> 1997 H.B. 3724.

tance may be used to help pay for the costs of environmental evaluations

### PENNSYLVANIA

Financial assistance is available to volunteers performing a cleanup under the Special Industrial Area program.<sup>107</sup> This program applies to industrial sites for which there is no financially responsible party and to land located within an Enterprise Zone designated by the Department of Community Affairs. Volunteers may receive funding for 75 percent or \$200,000, whichever is less, for site assessment costs and the lesser of 75 percent or \$1 million in any single year for remediation costs. The financial assistance is in the form of low interest loans to private parties or grants to municipalities or local economic development agencies

### TEXAS

Municipalities are authorized to grant a four-year tax abatement to owners of property located in a reinvestment zone that is remediated under the VCP program.<sup>108</sup>

### PRACTICAL CONSIDERATIONS

It is important to remember that while recent regulatory initiatives have made brownfields redevelopment more attractive, these projects are still real estate ventures that must make economic sense. To maximize the return on these contaminated properties, developers should consider the following factors when evaluating a potential brownfields redevelopment project:

1. During the planning or pre-acquisition stage of a project, a developer must have adequate information about environmental conditions at the site. If the mantra for real estate development is "location, location, location," the comparable adage for brownfields development is "information, information, information." For one thing, adequate information about environmental conditions is needed to avoid delays in obtaining approvals under a state voluntary cleanup program. It can take as long as six months to a year to generate the necessary information and determine the property's fair-market value. One way to shorten this time is to try to identify and select properties known as "low-hanging fruit." These are properties where a substantial amount of site investigation has been performed and environmental conditions are well known. Another option may be to have non-profits perform the investigatory work.

2. Once the environmental conditions have been identified, the prospective developer must estimate the project's remediation costs. These will vary depending on the anticipated use of the property if it is located in a state that has adopted risk-based cleanups that take land use into account. To make sure that remediation estimates are reliable, it is important that prospective brownfields developers assemble a team of environmental experts who are familiar with brownfields redevelopment. Brownfield investigations and cleanups, which permit a broad array of remedial alternatives, differ in many respects from superfund cleanups, and it is important to assemble a sophisticated environmental team that understands how these new programs work. The environmental engineer, for example, should be familiar with the latest cost-effective approaches to site

remediation. An engineer prone to overdesign will artificially inflate remediation estimates and cause project delays since any change to the remedy must be approved by state environmental authorities. Similarly, the environmental attorney should have a transactional background and experience negotiating administrative consent decrees. Real estate transactions have a limited lifespan and a superfund litigator who makes a living by conducting time-consuming discovery may not be the most suitable candidate to negotiate a brownfields cleanup agreement.

One way to "bracket" remediation costs is to have a VCP remedial action plan (RAP) approved by a state agency. The developer's team could draft and negotiate the RAP or the developer could assume an RAP that was negotiated by a non-profit brownfields organization.

3. Once the remediation costs have been established, the developer can then begin arranging its financing. When seeking bank financing, it is important to remember that most banks have established policies that preclude financing if remediation costs exceed a certain percentage of the appraised value of the property when clean. The threshold usually ranges between 25 percent and 40 percent of the fair market value of the property, although some financial institutions have cutoffs below 25 percent. If remediation costs exceed the bank's threshold, the lender may require the developer to provide additional equity to cover the excess costs.

As a condition to a loan commitment, financial institutions often require pre-approval of a RAP and remediation schedule by the state environmental authority. In some cases, banks may also require developers to enter into a VCP agreement with the state that not only limits the borrower's liability but also specifically extends the covenant not to sue to the lender. Since characterization of site conditions must be completed before a state will enter into a brownfields agreement, this again emphasizes the need to develop information on environmental conditions very early in the development process.

4. If the risk ratio is too high for conventional bank financing, the purchaser may have to restructure the transaction. One way to lower potential remediation costs may be to enter into a cost-sharing arrangement with the seller where the seller agrees to assume a certain portion of the liabilities associated with the property in exchange for a release from future liability. These cost-sharing arrangements lower a developer's remediation costs and, thus, improve the loan-to-value ratio. One way to induce a seller to enter into a cost-sharing arrangement may be to obtain a PPA from EPA that will release the prospective owner as well as the seller from future federal liability. This way the seller will have a higher confidence level that its potential future liability will be capped by its cost-sharing arrangement. Another approach may be to consider carving out more seriously contaminated parcels from the assets being acquired. In other cases, the developer may consider taking an easement or a lease instead of outright ownership of a particular contaminated parcel since, in some states, the liability of operators or easement holders may be less than that of owners.

5. If restructuring the deal is not possible or cannot bring the remediation costs within the risk tolerance of the lender, the prospective owner could apply for federal or state financial assistance programs that are

<sup>107</sup> Id. at § 6026.702.

<sup>108</sup> Id.



available for brownfields. The non-profit brownfields redevelopment funds might also be a good source for bridge financing to cover the remediation phase of a project or to raise the equity contribution that may be required by a bank.

Another tool used to lower the liability and remediation risks of a site is environmental insurance. During the past few years, a number of insurance products have been developed to help shift the liability associated with brownfields redevelopment. For example, a property transfer policy provides first party coverage for contamination discovered after a property has been sold when the contamination exceeds established cleanup levels. These policies can be written for financial institutions to cover the property's asset value or the outstanding balance of the loan. Some policies also provide protection to purchasers for additional remediation costs associated with claims from third parties that require the property owner to perform a cleanup. Another type of insurance product is the stop loss or remediation cost overrun policy, which provides coverage against cost overruns for site cleanups. This policy is underwritten based on an approved remediation plan and a cost estimate developed from a scope of work. Lenders and the seller can be named as additional insureds under the policy. While the costs and scope of

these insurance products vary, they generally cost at least 10 percent of the expected remediation costs, require costly investigations upfront, and often have exclusions that merit careful examination.

6. Finally, it is important for developers to garner strong support from local government and the community in which the site is located. A project that is opposed by the local population will suffer delays and increased costs that may make the project infeasible. Local government also can play an important role in helping the developer identify appropriate properties, locate prospective purchasers or users of the site, and work with state environmental and other government agencies to streamline regulatory approvals and obtain public funding.

Brownfields development can be a time-consuming and expensive process that entails significant risks. Each site involves different regulatory, technical, and economic issues that will significantly impact a project's viability. Developers can try to minimize the risks associated with these properties by developing information about these sites early in the process, using the recent regulatory reforms, and utilizing the financing mechanisms now available under the state and federal brownfields programs.